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In The
Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of a federal court's application of *forum non conveniens*, where the alternative to pursing the case in the U.S. is pursuing the case in another country, is the relevant *domestic* forum the United States (as the First, Eighth, and Eleventh Circuits have held) or merely the specific judicial district in which the district court sits (as the Third Circuit held below)?

RULE 29.6 STATEMENT

KPNQwest N.V. is a former Dutch telecommunications company in liquidation in the Netherlands. Petitioners Marcel Windt and E.T. Meijer ("Trustees") are trustees for the bankruptcy estate. Shares in KPNQwest N.V. were publicly held. The bankruptcy estate of KPNQwest N.V. has a number of creditors, some of which are publicly traded companies. If the Court requests, the Trustees can provide a list of creditors.

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PETITION FOR A WRIT OF CERTIORARI

Marcel Windt and E.T. Meijer ("Trustees"), trustees for the bankruptcy estate of KPNQwest N.V. ("KPNQwest"), respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit affirming dismissal of this case on grounds of *forum non conveniens*.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 529 F.3d 183 (3d Cir. 2008) and reprinted here beginning at Appendix ("App.") 1a. The district court's decision is reported at 544 F. Supp. 2d 409 (D.N.J. 2008) and reprinted here beginning at App. 38a.

JURISDICTION

The court of appeals denied the Trustees' petition for rehearing and rehearing *en banc* on July 14, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS

The following treaty and statutory provisions are relevant to the Court's consideration of the question presented:

The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, art. V, March 27, 1956, 8 U.S.T. 2043, provides that Dutch companies and nationals shall be "accorded national treatment with respect to access to the courts of justice [of the United States] in all degrees of jurisdiction, both in

pursuit and in defense of their rights." The text is reprinted in Appendix G.

The U.S. venue-transfer provision, 28 U.S.C. § 1404(a), states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The text is reprinted in Appendix F.

11 U.S.C. § 1501, *et seq.* incorporates the Model Law on Cross-Border Insolvency into U.S. law; 11 U.S.C. § 1504 provides foreign bankruptcy representatives direct access to U.S. bankruptcy courts; 11 U.S.C. § 1509(f) preserves a foreign bankruptcy trustee's right to pursue remedies in U.S. courts of general jurisdiction. The text of these provisions of Chapter 15 of the Bankruptcy Code are reprinted in Appendix H.

STATEMENT

This case presents a foundational question about the way a federal court in the United States should address *forum non conveniens* issues in an international setting. The court below answered that foundational question in a way that conflicts with the decisions of at least three other circuits. In so doing, it has constructed a major impediment to foreign plaintiffs bringing suit in the United States under federal law even when the claim is being asserted against U.S. companies and citizens in their home forum and even where the foreign plaintiffs are, by treaty, entitled to treatment on a par with U.S. citizens.

The question is especially appropriate for this Court to resolve because it addresses how federal courts present themselves and the United States to the world in the context of international litigation: either as part of a unified system of U.S. courts, as Congress intended, or as individual courts linked primarily to the particular districts in which they sit. In an era of expanded international trade, and at a time of unprecedented global economic turbulence and cross-border commercial disputes, it is critical to establish uniform federal law on this recurring and important issue. The Third Circuit's decision is at odds with this Court's precedents, the law of (at least) three other circuits, the statutory scheme established by Congress, and is, at a minimum, in tension with U.S. treaty obligations and policies affording foreign bankruptcy representatives access to U.S. courts in connection with international insolvencies.

Factual Background.

Plaintiff Trustees, the duly-appointed representatives of KPNQwest's bankruptcy estate in liquidation in the Netherlands, brought this claim in the United States against a U.S. corporation and several U.S. citizens and residents, seeking recoveries for the estate. They did so after obtaining approval of the Dutch court supervising the bankruptcy to commence this action.

As set forth in the First Amended Complaint, KPNQwest was a joint venture between Denver-based Qwest Communications International, Inc. ("Qwest"), a major U.S. telecommunications

company, and Koninklijke KPN N.V. a/k/a Royal KPN N.V., a Dutch telephone company.

The Trustees have alleged that KPNQwest was dominated by Qwest and Qwest officers who were placed in key positions. Qwest's Executive Vice President of International Business, Jack McMaster, a New Jersey resident, was installed as KPNQwest's CEO even as he continued to be paid by Qwest, and continued to report directly to Qwest's CEO, Joseph Nacchio. McMaster was also the sole member of KPNQwest's Management Board. Nacchio, also a New Jersey resident, took a seat on KPNQwest's Supervisory Board, actively participated in Supervisory Board meetings, and communicated with McMaster (who had temporarily relocated to Europe) on a daily basis from the United States. Robert Woodruff, Qwest's Chief Financial Officer and a resident of Colorado, also took a seat on the Supervisory Board, but continued to conduct his affairs as Qwest's CFO from the United States. Other Qwest executives were installed in key positions of control or influence at KPNQwest, such as the "Management Team" that assisted McMaster. Additional members of the Supervisory Board are U.S. residents.

KPNQwest was a valued asset on Qwest's U.S. books. It was therefore important to Qwest and its executives in the United States to maintain the appearance of value. To that end, Qwest and its personnel, operating from the United States, exercised control over KPNQwest and the way that

KPNQwest accounted for revenue. addition, Qwest arranged transactions with, and for, KPNQwest.

At the heart of the Trustees' case is the exporting of a deceptive accounting technique, by Qwest to KPNQwest, that caused key "non-Qwest" decision-makers and Supervisory Board members at KPNQwest to believe that business was thriving even though it was not. Far from it, KPNQwest was sinking deep into insolvency. Defendants' manipulations were ultimately exposed, resulting in KPNQwest's rapid demise.

KPNQwest declared bankruptcy in May 2002. It faces a liquidation deficit of more than $2 billion dollars. McMaster and various other executives, including KPNQwest's Chief Financial Officer, Chief Marketing Officer, and Vice President of Finance, returned to or took up residence in the United States. *See* App. 99a-104a.

Procedural History.

The Trustees filed this action on June 29, 2004, asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (describing deceptions perpetrated on the KPNQwest Board and decision-makers) and for mismanagement under Dutch law. Eighteen months into the case,

Defendants moved to dismiss on a theory of *forum non conveniens*.[1]

The Trustees opposed. They pointed out the reasons why they had brought this suit in the United States, namely that: (a) all defendants resided in the United States; (b) many of the most significant witnesses resided in the United States; (c) all of the documents that the Trustees sought from Qwest and others were in the United States (though the Trustees' own documents were in the Netherlands); (d) many of the alleged fraudulent acts were conducted from, and all were instigated in, the United States; (e) the principal beneficiary of the alleged scheme – Qwest – was located in the United States; (f) other factually related civil suits were pending here, seemingly making it more convenient for *defendants* to coordinate their litigation efforts here; (g) U.S. law should apply to unlawful acts committed from within U.S. borders; and (h) if they had filed suit in the Netherlands, it was far from certain that the Trustees could have compelled the attendance of all defendants and many of the witnesses.

Notwithstanding these considerations, the district court granted the defendants' motion and dismissed the case on grounds of *forum non conveniens*. *See* App. 38a, *et seq*.

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[1] Defendants had first moved to compel arbitration. That motion was denied by the magistrate judge and affirmed by the district court judge on appeal.

District Court Decision.

The district court's dismissal rested substantially on its view that U.S. courts are suspicious of foreign plaintiffs – including bankruptcy trustees operating under the statutory authority and supervision of their home nations – when they bring suit in the United States, even against U.S. defendants.

The district court indeed introduced its discussion of *forum non conveniens* by positing that U.S. courts "are suspicious" of foreign plaintiffs. App. 50a. It viewed foreign plaintiffs as likely "motivated by a search for a jurisdiction with laws that would be the most favorable for the claim." *Id.* *See also id.* n.10 (positing reasons why foreign plaintiffs would want to sue in the United States).

While acknowledging that plaintiffs generally have the right to choose the forum, the district court noted that deference to plaintiff's forum choice is granted presumptively only if the plaintiff proceeds in its home forum. Otherwise, deference is granted only if the plaintiff shows some measure of convenience (*i.e.*, a reason) for proceeding outside its home forum. *See* App. 49a, 57a-58a.

Here, the district court assigned only a "low degree of deference" to the Trustees' choice of forum because, on an individual and personal level, they had "neither personal nor business contacts with the United States or the State of New Jersey" and no intention of "moving their personal or business interests into the United States (or to the state of

New Jersey in particular)...." App. 57a, 58a. In focusing on the Trustees' *personal* convenience, the district court declined to evaluate the litigation-related reasons (convenience to documents, defendants and witnesses) why the Trustees viewed the United States as a convenient place to litigate in their appointed capacity.

The district court also suggested that as Dutch citizens, the Trustees were not entitled to deference in their choice of forum absent a treaty granting them treatment on a par with U.S. citizens. *See* App. 54a n.13. Positing the importance of such a treaty, the district court mistakenly held that there was no treaty granting Dutch citizens parity of treatment with U.S. citizens in U.S. courts. *See* App. 57a n.14. This was incorrect: The district court failed to realize that there is such a treaty, and that it was in the record of this case (*see* App. 106a). The treaty of friendship between the Netherlands and the United States provides that Dutch companies and nationals shall be "accorded national treatment with respect to access to the courts of justice [of the United States] ... in all degrees of jurisdiction, both in pursuit and in defense of their rights."[2]

The district court then opined that "the community of the District of New Jersey" had "little interest in the resolution of this case." App. 68a.

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[2] Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, art. V, March 27, 1956, 8 U.S.T. 2043. *See* App. 106a.

The court found that the competing private interests – access to evidence, cost of witness attendance, availability of process, and availability of impleader – were essentially a wash, yet concluded (erroneously, and notwithstanding that the burden of proof should have been on the defendants) that a wash favored dismissal. *See* App. 72a-81a.

The district court also stated that defendants were not obligated to demonstrate that the chosen forum was "oppressive or vexatious" to defendants – the traditional burden on defendants seeking dismissal for *forum non conveniens* under the cases of this Court. The district court stated that defendants did not have to shoulder that burden if plaintiff is foreign. *See* App. 81a.

Finally, the court rejected as irrelevant the significance of Chapter 15 of the Bankruptcy Code (11 U.S.C. § 1501, *et seq.*). *See* App. 91a-97a. Chapter 15 reflects a national policy encouraging U.S. courts to assist foreign bankruptcy trustees in pursuing their duties in federal court. It establishes special access to U.S. bankruptcy courts and preserves all other remedies historically available to bankruptcy trustees. *See* 11 U.S.C. § 1501 (stating purpose of facilitating cross-border insolvency proceedings in the interest of cooperation, fairness, efficiency, and trade and investment); *id.* § 1509(f) (preserving right of access to U.S. courts of general jurisdiction).

The Third Circuit's Decision.

On March 2, 2007, the Trustees appealed to the Third Circuit. Defendants cross-appealed on the arbitration issue they had earlier raised and lost (*see supra*, note 1). On appeal, the Trustees argued, *inter alia*, that the district court had been improperly hostile to their effort, as foreigners, to prosecute their claims in the United States. Over the course of its decision, the Third Circuit acknowledged several of the district court's errors.

Nonetheless, the Third Circuit affirmed on the basis of a theory, urged by defendants, that is equally inconsistent with the historical treatment of foreign plaintiffs in U.S. courts. Specifically, the Third Circuit ignored the Trustees' showing of convenience in the *United States*, holding that the inquiry should focus on the convenience of proceeding in *New Jersey*.

The Third Circuit panel stated that New Jersey "is not the home forum of the corporate defendant," that there was "no indication that evidence is concentrated in New Jersey," and that there was no "indication that a substantial amount of conduct giving rise to the instant dispute occurred in New Jersey." App. 15a. It held that because there was no clear connection to New Jersey, the Trustees would be denied the deference that a plaintiff is typically granted in choosing a forum. *See id.*

The panel stated that the relationship of a federal case to the United States "should be considered," but that "considerations of local

inconvenience may be so strong as to a [sic] dwarf considerations of national convenience." App. 16a.

The Third Circuit qualified its dismissal by stating that it was only ruling that the suit could not be maintained in New Jersey, and that it "would be problematic" to preclude the Trustees from reinstituting their suit in some other federal district. *See id.* It declined to address whether suit in the United States was appropriate in general. The Third Circuit's district-by-district approach thus expressly opens up the possibility of seriatim cases, in different districts, where each court would consider separately the relative convenience of its district as compared to the Netherlands.

Turning to public and private interest factors, the Third Circuit highlighted that the Trustees' claim was not "local" to *New Jersey*, and that "without a dispute local to the community of New Jersey, there is little public interest in subjecting that community to the burdens of jury service." App. 20a. The court found that "the Netherlands" did, by contrast, have a substantial interest in resolving this dispute. *See id.* It did not explain why it compared the public interests of the *country* of the Netherlands with those of the *State* of New Jersey.

Thus, on June 10, 2008, the court of appeals affirmed the district court's order of dismissal based

on *forum non coveniens*.[3] The Trustees timely petitioned for rehearing or rehearing *en banc*. That petition was denied on July 14, 2008. *See* App. 36a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION – ON WHICH THE CIRCUITS ARE DIVIDED – OF WHAT IS THE RELEVANT DOMESTIC FORUM.

The *forum non conveniens* analysis, as applied in an international setting, should require that the federal court compare the relative convenience or inconvenience of proceeding in the United States as a whole with the convenience of proceeding in some foreign country. The Third Circuit held to the contrary, endorsing a comparison between litigating in the foreign country (here, the Netherlands) and litigating in the particular federal district in which the case was brought (here, New Jersey).

The Third Circuit's approach is in direct conflict with the decisions of at least three other circuits that have held squarely to the contrary – and also decisions of several other circuits that have done so implicitly. *See Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1313 (11th Cir. 2002) (holding that entire United States is relevant forum); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 429 (1st Cir. 1991) (same); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir.

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[3] The court did not address the arbitration issue raised in the cross-appeal, finding it moot. *See* App. 32a.

1991) (same); *see also Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609 (D.C. Cir. 1983) (implying same by its application of the principle); *Villar v. Crowley Mar. Corp.*, 782 F.2d 1478, 1482-83 (9th Cir. 1986) (same). This Court's own cases reflect that the comparison must be with the United States as a whole, not a single judicial district. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240-41 (1981). *See also* discussion *infra* at 29-32.

Moreover, the conflict is an especially important one for this Court to resolve: The conflict arises in connection with the way the United States presents itself to the world and against the backdrop of laws and treaties that determine access to the federal courts as a matter of national, not local, policy. *See also* discussion *infra* at 32-34.

The Third Circuit's provincial focus on contacts with New Jersey, rather than the United States, ignores two fundamental precepts: (1) the federal court system represents a unified judiciary in which any district court should be capable of answering the question whether the case should proceed *anywhere* in the United States; and (2) in an international case, where the question is whether a case belongs in some foreign country, or in the United States, the entire nation, not the particular federal district in which the case was filed, provides the frame of reference for comparison. The federal government, and the federal courts, speak to the world not as separate districts but with a unified voice. The decision whether a case should be dismissed because

it is more properly brought in some foreign country is necessarily answered by considering the interests and contacts with this country, not some segment of this country.

The settled understanding that the United States provides the frame of reference for an international *forum non conveniens* inquiry is also firmly embedded in the statutory framework that Congress created to govern the distribution of cases within the federal judiciary. The Third Circuit's approach conflicts with that statutory framework by conflating the question whether a case should proceed in the United States with the separate question of the proper judicial district in which it should proceed. The question of whether a suit should proceed *in the United States* is entirely distinct from the question of whether it should proceed in a *particular judicial district*. The former question, of international implication, is determined under the doctrine of *forum non conveniens*. The latter question, of proper venue in the United States, is determined under 28 U.S.C. § 1404(a).

If it is determined under a *forum non conveniens* analysis that the suit is properly in the United States, the federal courts may then determine, under § 1404(a), *where* within the federal court system the suit should be heard. Or the process may be decided in reverse order: As specifically reflected in *Piper*, 454 U.S. at 240-41, the federal courts may first determine the best venue for the case to be heard in the United States, and then the chosen court may determine whether the case is really better suited to

be tried in another country. Either way, the *forum non conveniens* question (should the case proceed in the United States?) and the § 1404(a) question (should the case proceed in the particular judicial district?) are distinct. *See also* discussion *infra* at 25-28.

The weakness in the conceptual foundations of the Third Circuit's approach and the inconsistency of that approach both with the statutory framework for deciding such issues and with the law of five other circuits warrant this Court's attention. But the Third Circuit's approach is also of great practical importance given the large number of international commercial disputes engendered by an expanding global economy. The Third Circuit's approach dramatically shifts the balance in a *forum non conveniens* analysis and will result in more cases, even against U.S. defendants, being pursued in foreign courts.[4] Cross-border cases often involve U.S.-based defendants, witnesses, documents, and events spread across many judicial districts. Businesses operate in several states, their employees reside in different states, witnesses reside in different states, and documents may be stored in

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[4] It seems perfectly ordinary to sue a U.S. defendant in the United States. On its face, that approach appears designed to avoid long disputes over venue. If, instead, suing a U.S. defendant in a U.S. court will result in long, drawn-out battles over venue, such as the one here, and which may ultimately produce dismissals, foreign plaintiffs may simply choose to try to drag U.S. defendants to foreign courts.

different places. There may be no single judicial district in which suit is especially convenient, even if it is clear that the great weight of witnesses, documents, interests, and contacts are in the United States (as a whole). Thus, under the Third Circuit's approach, fewer foreign plaintiffs will be able to maintain their cases in the United States.

Indeed, the Third Circuit's focus on the district, rather than the United States, produces disturbing results in another way. Because the Third Circuit held that its duty was to determine only whether suit belonged in the District of New Jersey, and that it could not make a determination as respects the United States as a whole, the Third Circuit recognized that it remains for the Trustees to re-file elsewhere and test *forum non conveniens* issues anew in that other district. That seriatim approach to *forum non conveniens*, where federal courts in different judicial districts separately consider how suit in a given district stacks up against suit in the foreign country, is both unusual and troubling. It creates the unseemly possibility of having different federal courts address the same question from their own particular geographic and provincial perspectives, with the possibility of different outcomes depending on (a) the contacts between the case and the given judicial district; and worse, (b) the particular *forum non conveniens* legal test applied in that district. Having multiple district courts rule seriatim on such an issue in the same case, with the potential for conflicting approaches and conflicting results, should be unnecessary in our federal system. *See also* discussion *infra* at 28-29.

In sum, this petition presents important issues that this Court can readily resolve and should resolve. The Court should hold that for purposes of the *forum non conveniens* analysis, the relevant "U.S. forum" is the entire United States.

A. Proper *Forum Non Conveniens* Analysis Requires A Proper Definition Of The Forum.

The "central focus" of *forum non conveniens* is convenience. *See Piper*, 454 U.S. at 249 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). A plaintiff is ordinarily entitled to choose the forum for his suit. Plaintiff's choice of forum should "rarely be disturbed," *id.* at 241, and only may be disturbed if the defendant can show that trial in the chosen forum would "establish ... oppressiveness and vexation to [the] defendant ... out of all proportion to plaintiff's convenience...." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). *See also Williams v. Green Bay & W R. Co.*, 326 U.S. 549, 554 n.4 (1946) ("actual hardship" is the *sine qua non* of a successful *forum non conveniens* defense).

The "heavy burden" is always on defendant to show that the balance in the case is tipped so far against the particular forum that one may infer that it is being pursued in that forum as a weapon, *i.e.*, to vex or oppress. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007). In short, the *forum non conveniens* doctrine, as historically practiced, ensures that the plaintiff's choice of forum is not used "*solely in order to harass the defendant or take advantage of*

favorable law." *Piper*, 454 U.S. at 249 n.15 (emphasis added).

Forum non conveniens thus rests fundamentally on a comparison, balancing the conveniences of two competing forums. *See id.* at 241. In showing that the balance tips decidedly against the U.S. forum, it is essential, as a practical matter, to define what that U.S. forum is.

Defining the forum is also important in a second respect: helping to establish the deference afforded plaintiff's forum choice. Under this Court's precedents, the plaintiff's forum choice has been given great deference when plaintiff brings suit in its home forum. The home forum is presumptively convenient (and not vexatious). *See id.* at 255-56. However, a plaintiff suing outside its home forum, including a foreign plaintiff, was traditionally not given the same deference because it was presumptively less convenient for a plaintiff to bring suit outside its home forum, and thus more likely that the suit was brought to be vexatious.[5] *See id.*

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[5] There is reason to question whether this presumption still has a factual basis. Business plaintiffs frequently bring suit in *defendant's* home forum, often to *avoid* venue and jurisdictional disputes that might arise from dragging defendants elsewhere. Suit in defendant's home forum could properly be encouraged; no presumption should arise against it. Indeed, a healthier skepticism might be applied to a defendant's assertion that suit in its home forum is vexatiously inconvenient to it. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005) (foreign plaintiff's "decision to litigate in New

(continued....)

But the courts agree that a plaintiff regains the presumption of convenience, and thus deference to its choice of forum, where that plaintiff shows some measure of actual convenience in the chosen forum. *See, e.g., Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989); *Lony v. E.I. du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991). Where a showing is made that some measure of convenience supports the plaintiff's choice of forum, deference to plaintiff's choice of forum is restored.

This is especially true where the foreign plaintiff files suit in *defendant's* home forum. That, too, provides a strong indicator of convenience and demonstrates an obvious effort to *avoid* disputes about proper venue. There is simply nothing wrong or suspicious in a plaintiff suing in *defendants'* home court. *See supra*, note 5.

Here, the Trustees made a straightforward demonstration that they had not come to the United States to harass, but rather (upon being granted permission by the Dutch bankruptcy court) because

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(continued) . . .

York, where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed its decision to sue outside its home forum"). Cases in which U.S. courts have been skeptical of a foreign plaintiff's choice of a U.S. forum typically involve a *foreign* plaintiff's effort to sue *foreign* defendants in U.S. courts. *E.g., Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697 (1950).

it was convenient. The Trustees were following traditional notions of venue and fair play by bringing suit in defendants' home forum. Specifically, the pleadings and other papers demonstrated that:

- All defendants resided in the United States (and two of the individual defendants resided in New Jersey, making New Jersey an appropriate place for suit);
- Numerous witnesses, identified by affidavit, resided in the United States (including New Jersey and Colorado, as well as several other states);[6]
- The documents the Trustees were seeking (as opposed to those that they already possessed) were in the United States;
- Many of the alleged fraudulent acts were conducted or instigated in the United States;
- The principal beneficiary of the scheme was located in the United States;
- Other related civil suits were pending in the United States and it would have been easier for *defendants* to coordinate their litigation efforts in the same country;
- It was by no means certain that had they filed suit in the Netherlands, the Trustees

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[6] *See* App. 99a-104a.

could have compelled the attendance of all defendants; and

- The United States has an interest in applying its law to unlawful acts committed from within its borders.

Thus, this was a *country* in which *all defendants* reside, many key witnesses reside, the documents that the Trustees sought are located, personal jurisdiction over all defendants was certain, and much of the wrongdoing occurred. Suing in *defendants'* home forum seemed to provide a logical way of avoiding disputes over the proper forum and jurisdiction. For these reasons, the United States was a convenient and logical forum for this case.

In response to the Trustees' demonstration of the convenience of trying this case in the United States, defendants urged the Third Circuit to focus on New Jersey, claiming there was not "any support for Appellants' repeated assertion that the *forum non conveniens* analysis focuses on the U.S. as a whole," and contending that "the proper analysis focuses on ties to the forum district." The Court of Appeals accepted that approach and crafted its opinion based only on its analysis of the connections of the Trustees' lawsuit to *New Jersey* – and the interests of New Jersey and its jury venire in this lawsuit – which it regarded as *de minimis*. *See* App. 20a.

B. The Third Circuit's Focus On The "New Jersey Forum" Is At Odds With Basic Principles Of *Forum Non Conveniens* As Applied In The Federal Courts.

1. The United States Comprises A Single "Forum" In International Cases.

The federal government has a single, unitary court system. *See* U.S. Const., art. I, § 1. As a matter of convenience, economy, and practical sense, that system is divided into judicial *districts*, 28 U.S.C. §§ 81-131, but it remains a "unified federal system." *Piper*, 454 U.S. at 254. Each federal district court is given the power to decide issues affecting the United States as a whole, not merely issues affecting the interests of its particular judicial district. The Third Circuit's decision to address only the conveniences of the particular judicial district is fundamentally out of step with that authority.

In the international setting, where the choice is between suit in a foreign country and suit the United States, a federal court presented with a *forum non conveniens* motion may thus determine – and is assigned to determine – whether suit is proper in the United States, not merely in the particular district or state in which the court sits.

Indeed, the idea that the district court, as part of a single federal judiciary, should decide whether the case belongs in the United States (not just the judicial district in which it sits) reflects the way in

which the United States Government, including its court system, presents itself to the rest of the world. In matters of foreign policy and dealings with foreign governments, it is the United States of America that presents the nation's face to the world. *See United States v. Pink*, 315 U.S. 203, 233 (1942) (noting that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (pointing out that "complete power over international affairs is in the national government," and that "in respect of our foreign affairs generally, state lines disappear"). Thus, on an international level, the federal government enters into treaties with foreign governments about jurisdiction (*e.g.*, the treaty of friendship with the Netherlands), and enacts laws about how the United States will receive and treat foreign appointees, such as bankruptcy trustees (*see* 15 U.S.C. § 1509), as a nation. In the rare circumstances when courts are called upon to address the world – as in the *forum non conveniens* analysis, where the court decides whether it will keep an international lawsuit – the federal court should speak for the United States as a whole, not for a single district.

Moreover, as a matter of common sense, when judges weigh the relative conveniences of proceeding in a foreign nation, such as the Netherlands, against a U.S. forum, the comparison must be at the level of comparable political units. If judges are to consider the relative conveniences of proceeding in a foreign country, which they do (rather than the conveniences of proceeding in a particular province

or canton or department or municipality), they should choose a comparable unit here. That unit is the United States, not a particular judicial district or state.

The Third Circuit's approach rests on a form of provincialism that is inconsistent with the position of the United States in international relations. As explained above, by dividing the contacts, convenience, and interests of the United States among judicial districts, the practical result is that it will be much more difficult to maintain suit in the United States when a foreign forum might alternatively be available. But it reflects an equally important matter of principle: The United States has interests that go beyond the interests of a local jury venire. The real question in applying the *forum non conveniens* doctrine is not whether it is proper to burden the citizens of a particular judicial district with jury service, which is a § 1404(a) venue issue, but whether it is reasonable to burden *U.S. citizens* with jury service in the case.[7] Thus, the Third Circuit's focus on the lack of interest of the New Jersey venire was misplaced.

The principle that in the federal *forum non conveniens* analysis the proper comparison is between the conveniences of the United States as a forum with the convenience of the foreign nation as a

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[7] *See, e.g., Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 430 (1st Cir. 1991) (discussing the imposition of jury duty on United States citizens in dispute "local to the United States").

forum has long been implicit in the decisions of this Court and other circuit courts. *Piper*, for example, was a wrongful death case stemming from an airplane crash in Scotland that, after several venue changes, ended up in the Middle District of Pennsylvania. 454 U.S. at 240-41. In upholding the district court's dismissal, the Supreme Court looked at "[t]he American interest in this accident" versus the interests of the Scottish forum. *Id.* at 260-61. *Accord Villar v. Crowley Mar. Corp.*, 782 F.2d 1478, 1482-83 (9th Cir. 1986) (referring to the "American forum" and weighing the interests of "American jurors and court personnel" in its *forum non conveniens* analysis); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609-10 (D.C. Cir. 1983) (in suit brought by foreign plaintiffs, citing the litigation's "connection with the United States" and the "strong national interest in the litigation").

2. The Third Circuit's Approach Undermines The Statutory Framework Governing Choice Of Forum.

The Third Circuit's *forum non conveniens* formulation undermines the framework established by Congress for distributing cases among the various federal district courts. The common law doctrine of *forum non conveniens* had historically been used as a means of choosing between courts within the United States, as well as between the United States and foreign nations. But the former use for *forum non conveniens* has not been applied in the *federal court*

system since passage of 28 U.S.C. § 1404(a), the venue-transfer statute, over 60 years ago. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) ("federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad"); *Piper*, 454 U.S. at 253 (Congress intended § 1404(a) "to be a revision rather than a codification of the common law" doctrine of *forum non conveniens*); *Sinochem*, 127 S. Ct. at 1191.

Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Thus, if a case is filed in a district where venue is proper but otherwise inconvenient, the remedy is not to dismiss – as the Third Circuit did here because of its focus on the convenience of the New Jersey District – but to transfer it to another, more convenient, district. *See* 28 U.S.C. § 1404(a). Even where venue is improper, *transfer* within the federal system is preferred "if it be in the interest of justice." *Id.* § 1406(a).[8] *See also id.* § 1631.

The rule thus reflected in the present statutory scheme is straightforward: The question whether the particular district is convenient *vis-a-vis* some other district is decided under § 1404(a), with transfer being the appropriate remedy. The *forum*

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[8] *E.g.*, *Lafferty v. St. Riel*, 495 F.3d 72, 82-83 (3d Cir. 2007).

non conveniens doctrine, as applied in the international context, answers the question whether the suit belongs in this country.

Indeed, questions about the choice of the particular U.S. venue (the § 1404(a) question) have long been decided separately from questions about the convenience of the American forum (the *forum non conveniens* question). *See Piper*, 454 U.S. at 240-41 (case transferred from California to Pennsylvania under § 1404(a) and then the international *forum non conveniens* issue was addressed). In fact, the Court said as much in *Piper*: "§ 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*." *Id.* at 253. *See also Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 n.4 (2d Cir. 2001) (*en banc*) ("Where good reasons support conducting the litigation in the United States, but another U.S. district is markedly more convenient than the plaintiff's chosen forum, it will often be preferable 'for the convenience of parties and witnesses, in the interest of justice,' to transfer venue under 28 U.S.C. § 1404(a), rather than dismissing the case for *forum non conveniens*."); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 n.5 (8th Cir. 1991) ("Of course, if the plaintiff selects a federal district that is itself truly inconvenient for the defendant, the defendant can request a transfer to another federal district under 28 U.S.C. § 1404.").

The Third Circuit missed this distinction. As noted, the Third Circuit suggested in a dictum that federal district court in Denver might be a proper place to bring the case, given that Colorado is "the

home forum of the corporate defendant [*i.e.*, Qwest]". App. 15a. It emphasized that New Jersey lacked an interest. *See* App. 20a ("there is little public interest in subjecting [New Jersey citizens] to the burdens of jury service"). The court went on:

> It would be problematic if granting a motion to dismiss for *forum non conveniens*, based on local considerations, precluded a plaintiff from filing the suit in another, convenient district. Thus, the conclusion we reach in this case does not necessarily mean that this action may not be maintainable in another federal district.

App. 16a.

The Third Circuit's caveat exposes a central weakness in its approach. It requires each district court to separately answer the *forum non conveniens* question from the perspective of the specific judicial district in which that court sits, rather than speak for the United States as a single nation. It thus confuses the *forum non conveniens* issue with the inquiry under 28 U.S.C. § 1404(a).

3. The Third Circuit's Approach Invites Inefficiency And Inconsistency.

If the Third Circuit's approach of weighing convenience from the perspective of the particular district in which the district court sits were followed it would lead to seriatim consideration separately by a series of district courts. Here, indeed, the Third Circuit implicitly invited the Trustees to re-file their

case in the District of Colorado. But that would leave the District of Colorado with having to conduct an entirely independent *forum non conveniens* analysis (most likely under a different (*i.e.*, "Tenth Circuit") formulation). The notion of multiple courts considering the issue invites inefficiency and inconsistency.

There should be only one federal *forum non conveniens* analysis performed, and it should speak to the convenience of the entire United States. A rule that a plaintiff dismissed in one federal district on grounds of *forum non conveniens* should pick up and try again in another district would invite waste of scarce judicial resources, undermine the notion of a single, unified judiciary, and undermine the very premise of the venue-transfer provision, 28 U.S.C. § 1404(a), which is to *transfer* cases where another venue is more convenient.

C. This Court Should Resolve The Conflict Among The Circuits On This Important Issue Of Foreign Access To The Courts, Typically Addressed As A Matter Of National Policy.

The Third Circuit's ruling is flatly inconsistent with the decisions of the First, Eighth, and Eleventh Circuits, each of which has held that the forum

comparison should be *exclusively* between the United States and the foreign country.[9]

Specifically, the Eleventh Circuit emphasized the difference between how the *forum non conveniens* doctrine is applied in the federal and state courts in *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002), and at the same time marked the distinction between the *forum non conveniens* doctrine and venue transfer under § 1404(a). The question presented was whether, in a diversity case, the *forum non conveniens* analysis should be addressed as a matter of state or federal common law. The distinction was important because of the different forum focus, and the court concluded that the "federal rule" applied:

> The analytical inconsistency can be demonstrated by focusing on the Florida *forum non conveniens* standard, which only considers the contacts that a lawsuit has with the State of Florida. The Florida standard, if

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[9] The issue is recurring. For example, the question was recently posed to the Ninth Circuit, too, but not definitively answered. *See Schijndel v. Boeing Co.*, No. 06-55930, 2008 WL 65090 (9th Cir. Jan. 7, 2008) (slip op.). Responding to appellants' argument that the district court improperly compared the interests of *California* instead of "the United States as a whole," the court pointed out that "the district court did consider the United States' interest in the lawsuit," including "a number of factors whose significance remains the same whether the comparison is to California or to the United States as a whole...." *Id.* at *1.

> applied in federal court, would require the district court to ignore the contacts the suit might have with other states in the determination of whether dismissal is appropriate. In contrast, a thorough analysis under § 1404(a) necessarily requires that the district court consider the contacts that a lawsuit has with any of the fifty states to determine if the case should be transferred there. In other words, *a seamless system of national venue rules requires federal courts to look to the connections a lawsuit has with the entire United States.* Application of a state standard like Florida's, therefore, would require an analysis by the district court that is incongruent with the analysis required under § 1404(a).

Id. at 1313 (emphasis added); *see also id.* at 1303 (observing that "federal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole"); *see also La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983).

The First Circuit reached the same result in *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419 (1st Cir. 1991). In that case, the court of appeals faulted the district court's *forum non conveniens* analysis for focusing on plaintiff's contacts with the State of Massachusetts as compared to the United States. *Id.* at 429 (emphasis in original). Pointing out that "the choice facing the district court was between two

countries – the United States and Turkey," the First Circuit stated that at issue was "a controversy *local to the United States*, if not necessarily to Massachusetts") (first emphasis in original; second emphasis added).

And in *Hansen*, the Eighth Circuit observed the same rule: "the 'home forum' for the [U.S.] plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." 933 F.2d at 1394. *See also id.* n.5 (pointing out that as between courts within the United States, the remedy for selecting a more convenient venue is 28 U.S.C. § 1404). The Third Circuit's approach is flatly inconsistent with each of these decisions framing the analysis in terms of the United States as a whole.

The Third Circuit's analysis is also inconsistent with how this Court analyzed the forum comparison in *Piper*, and how the Ninth and D.C. Circuits have framed the forum comparison. *See Piper*, 454 U.S. at 260-61 (referring to "American" and "Scottish" interests); *Villar*, 782 F.2d at 1482-83 (referring to the "American forum"); *Friends for All Children*, 717 F.2d at 609 (citing lawsuit's "connection to the United States").

This Court should resolve this explicit conflict between the Third Circuit's decision and the decisions of the First, Eighth, and Eleventh Circuits (and, implicitly, the Ninth and D.C. Circuits).

Indeed, because the issue is one that affects the manner in which the United States presents itself to the world, it is the type of conflict among the circuits

that should be resolved expeditiously by this Court. Access to U.S. courts is a matter of national, not local, policy which ought not turn on considerations unique to any particular judicial district.

That the question of access to U.S. courts is a matter of national, not local, significance is demonstrated, for example, in Chapter 15 of the Bankruptcy Code, 11 U.S.C § 1501, *et seq*, which reflects a congressional policy of cooperation between "courts of the United States" and "the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." 11 U.S.C. § 1501(a)(1). That chapter encourages foreign bankruptcy trustees to use U.S. courts in connection with the administration of international insolvencies by granting access to bankruptcy court for certain actions, *e.g.*, § *id.* § 1504, and expressly preserving any right a "foreign representative may have to sue in a court of the United States to collect or recover a claim which is the property of the debtor." *Id.* § 1509(f). That is precisely this case.

Equally important, access to U.S. courts is frequently the subject of treaties. In this case, for example, there is a treaty of friendship between the United States and the Netherlands that gives Dutch entities "national access" to the U.S. courts, on par with American citizens. It provides that:

> Nationals and companies of either Party [the United States and the Netherlands] shall be accorded national treatment with respect to access to the courts of justice . . . within the territories of the other Party, in all degrees of

> jurisdiction, both in pursuit and in defense of their rights.

See App. 106a. *See Sumitomoshoji America, Inc. v. Avagliano*, 457 U.S. 176, 188 & n.18 (1982) (treaty granting "national treatment" guarantees that the foreign entity can come into U.S. courts "without suffering discrimination as an alien entity"). In light of a treaty commitment to give Dutch nationals and companies "national treatment" in U.S. courts, it is difficult to find justification for a restriction on that access based on the limited interests of the citizens of a single judicial district.

The Third Circuit's decision essentially stacks the deck against foreign plaintiffs, including foreign plaintiffs suing in their official, appointed capacity, undermining the national policies supporting access to U.S. courts, especially in the increasingly internationalized world of litigation and bankruptcy.

This Court should resolve this important conflict.

II. THE COURT MAY WISH TO CONSIDER SUMMARY DISPOSITION.

The prior decisions of this Court and Congress's decision to address *forum non conveniens* concerns within the United States by transfer rather than dismissal – combined with both the desire to address access to federal U.S. courts at the national level and the conceptual weaknesses in the Third Circuit's decision to ask district courts to speak only for the district, not for the United States – make it clear that the Third Circuit has set forth the wrong rule.

In applying the doctrine of *forum non conveniens* in an international setting, the relevant *domestic* forum is the entire United States. This Court may, in the interest of efficiency and to correct a fundamental error, dispose of this petition summarily.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2008

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APPENDIX A

UNITES STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4662 No. 06-4808

PRECEDENTIAL

MARCEL WINDT; E.T. MEIJER,
IN THEIR CAPACITY AS TRUSTEES
IN BANKRUPTCY FOR KPNQwest
N.V., et al,

Appellants at 06-4662/
Cross-Appellees at 06-
4808

v.

QWEST COMMUNICATIONS INTERNATIONAL,
INC.;
JOHN A. MCMASTER; JOSEPH P. NACCHIO;
ROBERT S. WOODRUFF,

Appellees at 06-4662/
Cross-Appellants at 06-
4808

Appeal from the United States District Court
for the District of New Jersey

D.C. No. 2:04-cv-03026
District Judge: Honorable Garrett E. Brown, Jr.,
Chief Judge

Argued March 11, 2008

Before: FUENTES, CHAGARES and ALDISERT,
Circuit Judges
(Filed: June 10, 2008)

OPINION OF THE COURT

ALDISERT, Circuit Judge

Marcel Windt and E.T. Meijer, in their capacity as trustees in bankruptcy for KPNQwest N.V. ("Trustees"), appeal from the dismissal of their

amended complaint on forum non conveniens grounds by the United States District Court for the District of New Jersey. The Trustees asserted claims against Qwest Communications International, Inc. ("Qwest"), Joseph P. Nacchio, Robert A. McMaster and Robert S. Woodruff (collectively referred to as "Defendants") arising from the bankruptcy of a Dutch company, KPNQwest N.V. ("KPNQwest"). Specifically, we must decide whether the District Court abused its discretion in assigning the Trustees' choice of forum a low degree of deference, whether the District Court abused its discretion in balancing the public and private interest factors implicated in this case, and whether the District Court abused its discretion in determining that litigation in the Trustees' chosen forum was oppressive or vexatious to the Defendants out of all proportion to the Trustees' convenience. For the reasons that follow, we will affirm the District Court's dismissal of the Trustees' amended complaint on forum non conveniens grounds.

I.

A.

In 1999, Qwest and KPN B.V., a wholly-owned subsidiary of Dutch multimedia company Koniklijke KPN N.V., engaged in a joint venture and formed KPNQwest. KPNQwest was organized as a Dutch corporation, had its principal place of business in Hoofddorp, Netherlands, and was established to construct a

European fiber optics telecommunications network. By 2002, KPNQwest was insolvent and filed for bankruptcy in a Dutch court.

As a result of the bankruptcy filing, Windt and Meijer were appointed by the Dutch bankruptcy court as trustees in bankruptcy for KPNQwest.[1] Pursuant to their official duties, the Trustees investigated the cause of KPNQwest's bankruptcy and brought this lawsuit on behalf of KPNQwest's bankruptcy estate. In June 2004, the Trustees filed a complaint in the United States District Court for the District of New Jersey. According to the complaint, the Defendants deceived KPNQwest's Supervisory Board about the financial solvency of KPNQwest in an effort to gain control of KPNQwest and manipulate its business to suit their objectives. The Trustees' complaint detailed a pattern of fraud, mismanagement and accounting improprieties that resulted in the ultimate failure of KPNQwest. Specifically, the complaint alleged one claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and one claim of mismanagement and breach of duty based upon

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[1] Originally, J.C. van Apeldoorn and E.T. Meijer were appointed as the trustees of the KPNQwest bankruptcy estate. Following his appointment, van Apeldoorn became ill, and Marcel Windt was substituted as a trustee.

violations of the Dutch Civil Code.

The Trustees' complaint named Qwest, Nacchio, McMaster and Woodruff as defendants. Qwest is a Delaware corporation with its principal place of business in Colorado. Nacchio, a New Jersey resident, previously served as Chairman and Chief Executive Officer of Qwest and as Chairman of the Supervisory Board of KPNQwest. McMaster, also a New Jersey resident, previously served as Qwest's Executive Vice President of International Business and was named by the Supervisory Board as KPNQwest's Chief Executive Officer. Woodruff, a Colorado resident, previously served as Chief Financial Officer of Qwest and was a member of KPNQwest's Supervisory Board.

On October 4, 2004, the Defendants moved to compel arbitration of the Trustees' claims. The motion was denied by a magistrate judge on June 16, 2005, and the Defendants appealed the denial to the District Court. On February 21, 2006, while the appeal to the District Court concerning the denial of the motion to compel arbitration was pending, the Defendants filed a motion to dismiss the Trustees' complaint on forum non conveniens grounds. On August 7, 2006, the District Court affirmed the magistrate judge's denial of the Defendants' motion to compel arbitration.[2]

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[2] The District Court's denial of the motion to compel arbitration is the subject of the Defendants' cross-appeal. Because we hold that the District

On September 20, 2006, the Trustees filed an amended complaint that asserted the same-essential facts and claims as their original complaint. The Defendants then notified the District Court that they would file a new motion to dismiss the amended complaint. The District Court deemed the prior motion to dismiss to be pending and, on October 17, 2006, dismissed the amended complaint on forum non conveniens grounds. The Trustees now appeal the District Court's dismissal of their amended complaint.

B.

In addition to this proceeding, other legal proceedings related to KPNQwest and the Defendants are currently pending, or were pending at the time the Trustees filed the instant complaint. Three lawsuits stemming from Qwest's relationship with KPNQwest have been filed in various U.S. state and federal courts. Taft v. Ackermans, No. 02-CV-795 1 (S.D.N.Y.), was a putative securities class action lawsuit filed in the United States District Court for the Southern District of New York and settled in early 2006. Grand v. Nacchio, No. C-2002-5348 (Pima County Superior CO, is a securities opt-out action filed in 2002 in Arizona state court that involved the

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Court did not abuse its discretion in dismissing the Trustees' amended complaint on forum non conveniens grounds, we will dismiss the cross-appeal as moot.

purchase of 285,000 shares of KPNQwest stock by a living trust. The trial court in Grand granted partial summary judgment in favor of the defendants. The plaintiffs voluntarily dismissed the remainder of their claims and appealed. Approximately one month after the District Court's dismissal in this case, the Arizona appellate court affirmed the trial court in part, reversed in part, and remanded the case to the trial court for further proceedings. Grand v. Nacchio, 147 P.3d 763 (Az. Ct. App. 2006). Subsequent to the filing of this lawsuit, another securities opt-out action, Appaloosa Investment Ltd. P'ship I v. Qwest Commc'ns Int'l, Inc., No. 05-CV-5674 (S.D.N.Y.), was filed in the United States District Court for the Southern District of New York and is pending in that court.

Litigation and other proceedings related to KPNQwest also arose in the Netherlands following the filing of the Trustees' complaint in New Jersey. On August 23, 2005, several Dutch KPNQwest shareholders petitioned the Enterprise Chamber, a branch of the Civil Court in Amsterdam with jurisdiction over corporate mismanagement claims, to begin an inquiry into the cause of KPNQwest's bankruptcy. The Enterprise Chamber granted the request, and all of the Defendants named in this lawsuit are involved in the investigatory proceeding before the Enterprise Chamber.

Several weeks before the District Court dismissed this case, Cargill Financial sued three of the Defendants named by the Trustees and several other parties related to the formation and/or operation of KPNQwest in the Netherlands. In its complaint, Cargill Financial asserts that three of the defendants named here and others fraudulently procured credit in an attempt to avoid the bankruptcy from which this litigation arises.

Insurance litigation is also pending in the Netherlands. The insurance cases involve all of the parties to this lawsuit and concern the insurers' nullification of directors' and officers' insurance policies covering various individuals associated with KPNQwest. In these cases, the insurers allege that the directors' and officers' insurance policies were fraudulently procured through the same mismanagement alleged in this lawsuit. In addition, KPNQwest's bankruptcy proceedings are still ongoing in the Dutch courts.

II.

The District Court had jurisdiction in this case pursuant to 28 U.S.C. § 1331 and § 1367. We have jurisdiction over final orders of the District Court pursuant to 28 U.S.C. § 1291. Our review in this case, however, is limited.

"[T]he district court is accorded substantial flexibility in evaluating a forum non conveniens motion, and '[e]ach case turns on its facts.'" Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988) (citations omitted). Furthermore, "[t]he forum non conveniens determination is committed to the sound discretion of the trial court." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981). This Court reviews a district court's dismissal of a complaint on forum non conveniens grounds for abuse of discretion. Id.; Lony v. E.I. Du Pont de Nemours & Co. ("Lony I"), 886 F.2d 628, 631 (3d Cir. 1989).

The district court's determination "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." Piper Aircraft Co., 454 U.S. at 257. Thus, "we do not perform a de novo resolution of forum non conveniens issues." Lacey v. Cessna Aircraft Co. ("Lacey I"), 862 F.2d 38, 43 (3d Cir. 1988). "[A] district court abuses its discretion in a forum non conveniens analysis when it fails to consider adequately and to determine the amount of deference due the foreign plaintiff's choice of forum or when it clearly errs in weighing the factors to be considered." Lony I, 886 F.2d at 632 (internal citations omitted).

III.

The Supreme Court has articulated precepts applicable in forum non conveniens cases. Although "a plaintiff's choice of forum should rarely be disturbed," Piper Aircraft Co., 454 U.S. at 241, a federal court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). When an alternative forum has jurisdiction to hear the case, and when trial in the plaintiff s chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff s convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947).

To guide the trial court's exercise of discretion and its determination of oppressiveness and vexation, the Supreme Court has prescribed a balancing of private interest factors affecting the convenience of the litigants and public interest factors affecting the convenience of the forum. See Gulf Oil, 330 U.S. at 508-509. Factors pertaining to the private interests of the litigants include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of

> willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 508. Public interest factors bearing on the inquiry include administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in "having the trial of a diversity case in a forum that is at home with the state law that must govern the case"; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. Id. at 508-509.

Applying these precepts to a particular case, when considering a motion to dismiss on forum non conveniens grounds, a district court must first determine whether an adequate alternative forum can entertain the case.[3] If such a forum exists, the district court must then

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[3] In this case, the District Court determined that the Netherlands provided an adequate alternative forum for the resolution of this dispute. Windt v. Qwest Commc'ns Int' l, Inc., ___F. Supp. 2d ____, 2008 WL 877981, *7 (D.N.J. Mar. 28, 2008) (reissued for publication). The Trustees do not contest this finding, so we will not address this prong of the forum non conveniens analysis.

determine the appropriate amount of deference to be given the plaintiff s choice of forum. Once the district court has determined the amount of deference due the plaintiffs choice of forum, the district court must balance the relevant public and private interest factors. If the balance of these factors indicates that trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiffs convenience, the district court may, in its discretion, dismiss the case on forum non conveniens grounds.

IV.

We first consider whether the District Court abused its discretion in assigning the Trustees' choice of forum a low degree of deference. Ordinarily, a strong presumption of convenience exists in favor of a domestic plaintiffs chosen forum, and this presumption may be overcome only when the balance of the public and private interests clearly favors an alternate forum. Piper Aircraft Co., 454 U.S. at 255. "When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." Id. at 256. Foreign plaintiffs, however, may bolster the amount of deference due their choice by making a strong showing of convenience. Lony I, 886 F.2d at 634. Thus, in performing its forum non conveniens inquiry in a case filed by a

foreign plaintiff, the "district court must assess[, and articulate,] whether the considerable evidence of convenience has .. . overcome any reason to refrain from extending full deference to the foreign plaintiff's choice." Id.

A.

After considering the evidence of convenience to the Trustees in filing their amended complaint in the District of New Jersey, the District Court accorded the foreign Trustees a low degree of deference:

> It is illogical for a bankruptcy trustee to assert that it would be more convenient to bring an action thousands of miles away, while this trustee: (a) has to play a part in the related bankruptcy proceedings in his home forum, and (b) has his defendants already brought into his home forum on two other actions which are nearly identical in nature to the action the trustee desires to pursue, and in one of which the trustee has already been ordered to appear. Since one can hardly perceive any convenience in having multiple massive litigations on both sides of the Atlantic, this Court discerns little evidence of convenience to Plaintiffs in Plaintiffs' decision to file this action with this Court and, thus, accords Plaintiffs' forum selection a low

degree of deference.

Windt v. Qwest Commc'ns Int'l, Inc., ____F. Supp. 2d ____, 2008 WL 877981, *6 (D.N.J. Mar. 28, 2008) (reissued for publication).

The Trustees contend that their filing of this action in the Defendants' home forum strongly supports a finding that their choice was a convenient one, and thus they should be accorded the same deference as a domestic plaintiff. The Trustees direct our attention to our statement in Lony I:

The foreign plaintiff is suing the defendant in the latter's home forum where the latter's corporate headquarters, headquarters of the division in question, and research laboratories are located. That in itself has considerable weight in showing that the plaintiff[']s choice of forum was based on convenience. In addition, the plaintiff has taken pains to show that much of the evidence it needs to establish liability is located in the forum it chose, and the conduct that caused the alleged injury issued from [the chosen forum].

Lony I, 886 F.2d at 634.

B.

In determining the amount of deference due the Trustees' choice of forum, the District Court properly considered the particular circumstances of this litigation, including the Trustees' and Defendants' connections with New Jersey and the

pending litigation in the Netherlands. The facts of this case differ from those of Lony I, in which the plaintiff, a German sole proprietorship, filed suit in the District of Delaware against a Delaware corporation that had its principal place of business in Delaware. Id. at 629-630. Although two individual defendants in this case are residents of New Jersey, that state is not the home forum of the corporate defendant or another individual defendant named in the Trustees' amended complaint. There is also no indication that evidence is concentrated in New Jersey, nor is there an indication that a substantial amount of conduct giving rise to the instant dispute occurred in New Jersey. Thus, the forum chosen by the plaintiffs in Lony I had a more substantial relationship to the parties and events involved in that case than New Jersey has to the parties and events involved in this case. In the context of this particular issue, therefore, Lony I is not a proper analogue.

Furthermore, the Trustees are Dutch residents acting as representatives of an insolvent Dutch corporation. Beyond this litigation, the Trustees have no connections to New Jersey in their representative or personal capacities. At the time the Trustees brought this suit, they were already immersed in the Dutch bankruptcy proceedings involving KPNQwest. Considering the particular circumstances of this case, we are satisfied that the District Court did not abuse its discretion in according the Trustees' choice of forum a low degree of deference.

C.

In this case, two defendants were located in New Jersey and two were located in Colorado. The Trustees argue that these circumstances should not affect this Court's conclusion as to the convenience of filing in the District of New Jersey because "the forum non conveniens inquiry looks to contacts with the United States, not the state where the federal court is located." Appellants' Br. at 34 n.17. The Trustees misconstrue the flexible forum non conveniens analysis. Although the relationship between the United States and a case generally should be considered, this does not mean that the relationship between the local federal court district and the case should not. Indeed, considerations of local inconvenience may be so strong as to a [sic] dwarf considerations of national convenience.

This comment warrants a caveat. Often, defendants, evidence and witnesses will be spread throughout numerous districts. It would be problematic if granting a motion to dismiss for forum non conveniens, based on local considerations, precluded a plaintiff from filing the suit in another, convenient district. Thus, the conclusion we reach in this case does not necessarily mean that this action may not be maintainable in another federal district. Whether an action dismissed by one federal court on forum non conveniens grounds is maintainable in another federal court would depend on various factors, including whether the possibility of a transfer under 28 U.S.C. § 1404(a) was considered by

the District Court, see Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp., 660 F.2d 712, 716-717 (8th Cir. 1981) (declining to apply res judicata or law of the case doctrine to a dismissal by a different district court on forum non conveniens grounds, when the other court did not consider whether transfer was appropriate), whether differences between the districts made one more convenient, see Pastewka v. Texaco, Inc., 565 F.2d 851, 854 (3d Cir. 1977) (holding that a prior forum non conveniens dismissal in federal court in New York barred relitigation in federal court in Delaware where the plaintiffs conceded that both the objective legal criteria and the material facts underlying the application of those criteria were identical), and whether the first federal court grounded its decision on national or local considerations, see Villar v. Crowley Mar. Corp., 990 F.2d 1489, 1498 (5th Cir. 1993), abrogated on other grounds by Marathon Oil Co. v. Ruhrgas, 145 F.3d 211 (5th Cir. 1998) (affirming the application of res judicata to a different court's dismissal on forum non conveniens grounds when the other court "found that no forum in the United States was convenient").

V.

Although the Trustees' choice of forum was accorded a low degree of deference, the Defendants must nevertheless demonstrate that a forum non conveniens dismissal is warranted. To determine whether the Defendants adequately demonstrated that dismissal was warranted, we turn to the

District Court's analysis of the oppression and vexation prong of the forum non conveniens inquiry. When an alternative forum has jurisdiction to hear the case, and when trial in the plaintiffs chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiffs convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the district court may, in the exercise of its sound discretion, dismiss the case. Koster, 330 U.S. at 524. To guide its exercise of discretion, the district court must balance the relevant public and private interest factors and determine whether the balance of these factors favors dismissal of the case.

A defendant seeking dismissal on forum non conveniens grounds must show that the balance of the public and private factors "tips decidedly in favor of trial in the foreign forum." Lacey v. Cessna Aircraft Co. ("Lacey II"), 932 F.2d 170, 180 (3d Cir. 1991). "If, when added together, the relevant private and public interest factors are in equipose, or even if they lean only slightly toward dismissal, the motion to dismiss must be denied." Id. In this case, the District Court decided that the balance tipped decidedly toward trial in the Netherlands. We now review its analysis.

A.

1.

We first examine the local nature of the dispute and the public interest in resolving local disputes locally. The District Court observed:

> [T]he case at bar concerns the allegations of fraud and mismanagement of a Dutch business entity by a board member and executives of that corporation, and by that corporation's controlling holder. The fact that two of these defendants are domiciled in the state of New Jersey does not transform the case into a "local dispute," nor can the facts that four Board meetings took place somewhere in the United States and Defendants, while being present in the United States, took part in five international conference calls, cannot transform the case into an "American" dispute.

Windt, ____F. Supp. 2d at _____, 2008 WL 877981, at *8 (emphases in original).

We agree with the District Court that the Trustees' complaint does not raise a local dispute. The Trustees' amended complaint alleges fraud and mismanagement perpetrated on a Dutch company by

executives, board members and a corporate shareholder of that Dutch company. Although two of the defendants are residents of New Jersey, there are no allegations that actions or events occurring in New Jersey gave rise to the fraud and mismanagement at issue in this case. Moreover, without a dispute local to the community of New Jersey, there is little public interest in subjecting that community to the burdens of jury service. Cf. Dahl v. United Techs. Corp., 632 F.2d 1027, 1032 (3d Cir. 1980) ("The only contact that Delaware has with this case is that it is [the defendant's] state of incorporation. Indeed, [the defendant's] principal place of business is in Connecticut. We therefore conclude that the commitment of Delaware judicial time and resources to this case is not justified by any nexus Delaware has with what is essentially a Norwegian case.").

> In [sic] cannot be denied that the Netherlands has a substantial interest in resolving this dispute as it involves the alleged mismanagement of a Dutch company by Supervisory Board members and executives of that Dutch company. Indeed, Dutch shareholders of KPNQwest have successfully petitioned the Enterprise Chamber in the Netherlands to investigate the alleged mismanagement of the company. In light of New Jersey's lack of associations with this case and the Netherlands' substantial associations with this case, the District Court reasonably concluded that the non-local nature of the dispute and the

burdens of jury service on the local community in resolving this non-local dispute favored dismissal of the Trustees' amended complaint.

2.

We next examine the necessity of applying foreign law and avoiding problems in its application. The Trustees assert one claim under the U.S. RICO statute and one claim of mismanagement and breach of fiduciary duty, implicating eleven provisions of the Dutch Civil Code. Federal courts have refused to afford RICO claims special treatment in forum non conveniens inquiries and have found dismissal on this basis proper in cases involving RICO claims. See, e.g., Gemini Capital Group v. Yap Fishing Corp., 150 F.3d 1088 (9th Cir. 1998); Alfadda v. Fenn, 159 F.3d 41 (2d Cir. 1998); Republic of Panama v. BCCI Holdings (Luxemburg) S.A., 119 F.3d 935 (11th Cir. 1997); Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138 (5th Cir. 1989). Were this case to remain in New Jersey, the District Court would be required to examine and apply eleven provisions of the Dutch Civil Code. On this basis, we cannot say that the District Court was unreasonable in concluding that avoiding problems in the application of foreign law favored dismissal.

3.

Although we recognize that the United States has an interest in redressing wrongful conduct engaged in by a U.S. corporation and American executives, this general national interest does not outweigh the limited connection between New Jersey and this dispute. See Dahl, 632 F.2d at 1033 ("This lawsuit has little connection to Delaware and we believe the general national interest in aircraft regulation is not sufficient by itself to warrant retention of jurisdiction over an action when the other factors favor dismissal."); Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 1002 (2d Cir. 1993) ("While . . . United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens."). Considering all of the public interest factors implicated in this case, the District Court did not abuse its discretion in determining that the balance of these factors favored dismissal.

B.

1.

Turning to the private interest factors, we first examine the ease of access to evidence required in this case. Based upon the parties' representations to this Court and to the District Court, it appears that

the physical evidence in this case consists of thousands of boxes of documents. The Trustees do not challenge the District Court's finding that "[t]he expenses and complexity associated with such production and examination appear[] to be the same regardless of whether the case is litigated in New jersey or in Amsterdam." Windt, ____F. Supp. 2d at _____, 2008 WL 877981, at *9 n.24.

2.

We next examine the cost for willing witnesses to attend trial and the methods available for compelling the attendance of unwilling witnesses. Many of the witnesses required in this case are already embroiled in investigations and litigation in the Netherlands related to the insolvency of KPNQwest. Thus, transportation and lodging costs may be saved by litigating this dispute in the Netherlands, where the presence of many witnesses relevant to this case is already required. Although the Trustees presented affidavits to the District Court identifying witnesses residing in the United States, almost all of the witnesses reside outside of New Jersey. The Defendants also presented affidavits to the District Court stating that many of the witnesses and potentially responsible non-parties reside in Europe. We conclude that the District Court reasonably determined that the logistics associated with obtaining the presence of willing witnesses favored dismissal of the Trustees' amended complaint.

Regarding compelling the presence of unwilling witnesses, the District Court found the procedures available in the Dutch courts adequate to ensure their presence. It determined that the Trustees "would have no more problem in compelling unwilling United States and European witnesses to take part in Dutch proceedings than what Defendants might face in trying to compel unwilling Netherlands-based or other European witnesses to take part in this Court's proceedings." Id. at _____, *11.

Although we do not believe this conclusion is unreasonable, the District Court erroneously noted that this consideration favored dismissal. Id. at _____, * 10. As the District Court considered the burdens of compelling unwilling witnesses to attend trial to be equal in New Jersey and the Netherlands, it should not have considered this particular factor as one favoring dismissal. Cf. Lony I, 886 F.2d at 635 ("When the [district] court found the private interest factors to be 'at equipose' ... it should have concluded that they weighed in favor of retaining jurisdiction, not that they tipped 'toward dismissal.'). As this portion of the forum non conveniens inquiry balances and weighs the relevant interests, however, we cannot say that the District Court abused its discretion when it determined that the totality of the private interest factors favored dismissal.

3.

We must also consider other factors that lead to the expeditious and efficient resolution of the litigation. One such factor is the Defendants' stated desire to pursue contribution claims against potentially responsible third parties in the Netherlands and other European countries. The District Court properly considered these claims and found that the Defendants' desire to pursue these claims favored dismissal. The Defendants' pursuit of contribution claims would result in additional, related litigation in the Netherlands, and resolving all of these matters in the Netherlands would lead to the most efficient and expeditious resolution of this dispute. See Piper Aircraft Co., 454 U.S. at 259 ("It is true, of course, that if [the defendants] were found liable after a trial in the United States, they could institute an action for indemnity or contribution against [related third] parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial."). Thus, the District Court properly decided that the Defendants' pursuit of contribution claims in the Netherlands favored dismissal of the Trustees' amended
complaint.

As it appears that the District Court properly and thoroughly considered the particular circumstances presented by this litigation, we cannot conclude that the District Court abused its discretion in determining that the balance of the public and private interest factors clearly favored dismissal.

VI.

Guided by the aforementioned considerations, we will decide whether the District Court abused its discretion in finding that continuing with this litigation in New Jersey would be oppressive or vexatious to the Defendants in light of the convenience to the Trustees.

A.

Addressing the applicability of this portion of the forum non conveniens inquiry to this dispute, the District Court stated:

> [U]nder the holding of Piper[Aircraft Co.], the defendant has to make an "oppressive or vexatious" showing only in case if [sic] the plaintiff is suing in plaintiff s home forum. Since there is no dispute that Plaintiffs in the instant action are not suing in their home forum, the "oppressive or vexatious" inquiry is inapplicable to the case at bar.

Windt, ___F. Supp. 2d at _____, 2008 WL 877981, at *11 (internal citation omitted) (emphases in original). We agree with the Trustees that this statement is partly erroneous. Piper Aircraft Co. does not excuse a defendant from showing that litigating in the chosen forum would be oppressive or vexatious when the plaintiff is not suing in the plaintiff s home forum. See Piper Aircraft Co., 454 U.S. at 241 (examining oppression and vexation and

the district court's balancing of the relevant public and private interest factors in a case brought by Scottish plaintiffs). A defendant must show that litigation in the chosen forum is oppressive or vexatious regardless of whether the plaintiff brings suit in his home forum. The statement by the District Court concerning the inapplicability of the oppressive or vexatious requirement in this case does not comport with the principles governing the forum non conveniens inquiry. Notwithstanding its contrary prefatory statement, however, the District Court then proceeded to perform the oppressive or vexatious inquiry, and its actual consideration and analysis permits .us to review its determination.

B.

The District Court considered the relevant public and private interest factors, as well as the extensive litigation pending in the Netherlands, when it determined that continuing with this lawsuit in New Jersey would be oppressive or vexatious to the Defendants:

> Given [that Defendants are involved in litigation in both New Jersey and the Netherlands], it is not surprising that Defendants see Plaintiffs' litigation in New Jersey as "oppressive or vexatious," since Defendants would be forced to stretch their resources over both sides of the ocean by: (1) hiring

> different counsel to meet two different sets of bar admission requirements and two different sets of procedural rules; (2) losing the opportunity to seek joinder of actions; (3) flying witnesses and themselves across the Atlantic both ways on a regular basis, thus incurring substantial travel and accommodation expenses; and (4) having to translate all relevant documents and testimony, etc. Viewed through the prism of conveniences available to Plaintiffs in Plaintiffs' home forum and potential dire exhaustion of Defendants' resources through a cluster of transatlantic litigations, Plaintiffs' action appears to be "oppressive or vexatious,".

Windt, ____F. Supp. 2d at _____, 2008 WL 877981, at *12.

1.

The Trustees contend that the District Court erred by considering Dutch litigation and investigations commenced subsequent to the filing of the instant lawsuit. The forum non conveniens doctrine, however, does not require a district court to ignore factors that may impact the analysis simply because the factors arose after the filing of the lawsuit. See Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248 (5th Cir. 1983) ("The forum non

conveniens analysis has never asked the courts to reconstruct and weigh[] the relative conveniences as they existed when plaintiff brought suit. Instead, the forum non conveniens inquiry – including the convenience, availability and adequacy elements – has always been conducted in the present tense."). That the Dutch proceedings were initiated after this lawsuit was filed does not make the considerations of convenience, oppression and vexation stemming from those proceedings less relevant, as they were pending at the time of the District Court's dismissal order.

2.

The Trustees contend also that the District Court misunderstood the nature of the Dutch proceedings and their relation to this litigation. The Trustees characterize the Enterprise Chamber proceeding as "still in its formative stages and . . . not itself a civil litigation." Appellants' Br. at 46. The investigative nature of the Enterprise Chamber proceeding, however, does not lead to the conclusion that the District Court improperly considered the proceeding. See Dahl, 632 F.2d at 1030 (considering a then-pending investigation by the Norwegian Civil Aviation Administration in assessing the private interests of the parties relevant to the forum non conveniens analysis); Kryvicky v. Scandinavian Airlines Sys., 807 F.2d 514, 516 (6th Cir. 1986) (affirming the district court's analysis of the private interest factors, including its consideration of the implications of a Spanish investigation of ing m

Piper Aircraft Co. or this Court's subsequent case law teaches that only civil litigation, as distinguished from formal investigations, may be considered in assessing the oppression and vexation suffered by a defendant.

The Trustees contend that the District Court erroneously concluded that the New jersey proceeding and Cargill Financial litigation were significantly related. We disagree. The complaint filed by Cargill Financial in the Netherlands alleges that KPNQwest and several individuals intimately associated with KPNQwest (including Defendants Nacchio and McMaster) intentionally misrepresented KPNQwest's financial status and solvency to Cargill Financial when KPNQwest sought to secure a credit facility from Cargill Financial. Cargill Financial's complaint also alleges that all of the defendants named in it were integral in creating or perpetuating the misrepresentations about KPNQwest's financial condition and "knew or should of known that KPNQwest's financial condition was not sound and its business plan not fully funded." App. JA1165. Although the Cargill Financial litigation focuses on one credit transaction, it appears to involve some of the same issues as this litigation, namely the Defendants' representations concerning KPNQwest's financial condition and the mismanagement of KPNQwest.

Additionally, the Trustees assert that the District Court's factual misunderstandings concerning the insurance suits in the Netherlands

led to its erroneous conclusion about the similarities between the insurance litigation and this litigation. The insurers seek to be relieved of their insurance obligations because of the actions of the Supervisory Board and KPNQwest officials in misleading them and the public about the financial health of the company. The insurance litigation names all of the individuals in this lawsuit and contains many of the same issues raised in this litigation.

3.

Finally, the Trustees allege that the District Court improperly ignored the J.S.-based, related litigation when it determined that litigation in New Jersey would be oppressive or vexatious. Taft v. Ackermans, filed in the Southern District of New York, was settled in early 2006. Thus, this litigation had terminated by the time the District Court issued its dismissal order in this case. Grand v. Nacchio was pending in the Arizona appellate courts after the trial court granted summary judgment in favor of the defendants (including Qwest, Nacchio and McMaster). Based on the record presented to the District Court, the issues presented in Grand do not appear to be as significant or substantial as this litigation or the litigation in the Netherlands.

We therefore conclude that the District Court did not abuse its discretion when it determined that litigating this dispute in New Jersey would be oppressive or vexatious to the Defendants and that such oppression or vexation outweighed the

convenience to the Trustees in litigating this dispute in New Jersey.

* * * * *

Having considered all of the Trustees' contentions raised in this appeal, we are satisfied that the District Court did not abuse its discretion in according the Trustees' forum choice a low degree of deference, that the District Court did not abuse its discretion in balancing the public and private interest factors, and that the District Court did not abuse its discretion in determining that continuing with this lawsuit in New Jersey would be oppressive or vexatious to the Defendants out of all proportion to the convenience of the Trustees.

Accordingly, we will affirm the District Court's dismissal of the Trustees' amended complaint. The Defendants' cross-appeal concerning the denial of its motion to compel arbitration will be dismissed as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4662
No. 06-4808

MARCEL WINDT; E.T. MEIJER,
IN THEIR CAPACITY AS TRUSTEES
IN BANKRUPTCY FOR KPNQwest
N.V., et al,

Appellees at 06-4662/
Cross-Appellants at 06-4808

Appeal from the United States District Court
for the District of New Jersey
D.C. No. 2:04-cv-03026
District Judge: Honorable Garrett E. Brown, Jr.,
Chief Judge

Argued March 11, 2008

Before: FUENTES, CHAGARES and ALDISERT,
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of new Jersey and was argued on March 11, 2008.

On consideration whereof, it is hereby ORDERED AND ADJUDGED that the Order of the District Court dated October 17, 2006, be and is affirmed. It is further ORDERED AND ADJUDGED that the cross-appeal docketed at No. 06-4808 be and is dismissed as moot. The parties shall bear their own costs.

All of the above is in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: June 10, 2008

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4662
No. 06-4808

MARCEL WINDT; E.T. MEIJER,
IN THEIR CAPACITY AS TRUSTEES
IN BANKRUPTCY FOR KPNQwest
N.V., et al,

Appellees at 06-4662/
Cross-Appellants at 06-4808

v.

QWEST COMMUNICATIONS INTERNATIONAL,
INC.;
JOHN A. MCMASTER; JOSEPH P. NACCHIO;
ROBERT S. WOODRUFF,

Appellees at 06-4662/
Cross-Appellants at 06-4808

Appeal from the United States District Court
for the District of New Jersey
D.C. No. 2:04-cv-03026

District Judge: Honorable Garrett E. Brown, Jr., Chief Judge

Argued March 11, 2008

Before: SCRICA, Chief Judge, SLOVITER, McKEE, RENDELL, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and ALDISERT,* Circuit Judges

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SUR PETITION FOR REHEARING OR PETITION FOR REHEARING EN BANC

The Petition for Rehearing filed by Appellants/Cross-Appellees having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

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* Judge Aldisert's vote was limited to panel rehearing only.

BY THE COURT

Ruggero J. Aldisert
Circuit Judge

Dated: July 14, 2008

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 04-3026 (GEB)

MARCEL WINDT and E.T. MEIJER,
Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., et al,
Defendants.

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[1]

GARRETT E. BROWN, Jr., Chief Judge

This matter is before the Court on Defendants' motions to dismiss Plaintiffs' complaint (hereinafter

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[1] Plaintiff J.C. van Apeldoorn was replaced by Plaintiff Marcel Windt causing the caption in this action to be changed accordingly.

"Complaint") on the grounds of forum non conveniens.[2]

The procedural history of the case, while lengthy, appears to have little bearing on the issue at bar. Therefore, it shall suffice to note that the Complaint (seeking a jury trial and alleging numerous claims related to securities fraud,

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[2] Amended Complaint was filed on September 21, 2006, upon substitution of J.C. van Apeldoorn by Marcel Windt. See Docket Entry No. 81. As in the original Complaint, the Amended Complaint seeks: (1) damages equal to the liquidation deficit of the bankruptcy estate, (2) treble damages, pursuant to 18 U.S.C. § 1964, (3) punitive damages in the amount determined by the jury, and (4) costs and expenses in bringing this action, together with attorney's fees. See Docket Entries No. 1 at 124-25, and 81 at 174-75. Although Plaintiffs' Amended Complain exceeds Plaintiffs' original Complaint by fifty pages, compare Docket Entries No. 1 and 81, Plaintiffs' Amended Complaint effectively repeats the statements made in Plaintiffs' original Complaint with respect to the issue of forum non conveniens, see Docket Entries No. 1 at 11-12, and 81 at 9-10. The enlargement of Plaintiffs' pleading is a result of Plaintiffs' elaboration on the facts supporting Plaintiffs' claims under 18 U.S.C. § 1964. Therefore, for the purposes of the instant Opinion and accompanying order, there is no distinction between the Amended and original Complaints.

breaches of fiduciary duty and various forms of intentional misrepresentation) was filed on June 29, 2004, see Docket Entry No. 1, and this Court issued an order dated June 17, 2005, refusing to compel arbitration and stay the instant proceedings. See Docket Entry No. 46. Following this decision, Plaintiffs sought discovery, see Docket Entries No. 53, 59, 75-76, and limited discovery was conducted. On February 21, 2006, Defendant Qwest Communications International, Inc. (hereinafter "Qwest") filed the instant motion (hereinafter "Motion"), see Docket Entry No. 66, and on April 13, 2006, the remaining Defendants filed their joint statement in support of Qwest's Motion to dismiss Plaintiffs' Complaint. See Docket Entry No. 66. Plaintiffs filed their opposition to Qwest's Motion (hereinafter "Opposition") on April 18, 2006, see Docket Entry No. 69, and Qwest filed its reply (hereinafter "Reply") on May 10, 2006. See Docket Entry No. 71.

The matter was transferred to the undersigned on August 7, 2006. This Court has reviewed all documents filed and submitted, and has decided the pending motions without oral arguments pursuant to Rule 78 of Civil Procedure. For the following reasons, Defendants' motions to dismiss will be granted.

BACKGROUND

Plaintiffs are Dutch attorneys acting as bankruptcy trustees after being appointed by a Dutch court to represent the estate of (a) KPNQwest

N.V. (hereinafter "KPNQwest," a Dutch corporation established as a joint-venture between Koninklijke KPN N.V., a telecommunication company having its seat in Hoofddorp, Netherlands, and Qwest, a Delaware-incorporated entity having its principal place of business in Denver, Colorado), and (b) KPNQwest's wholly-owned Netherlands-based and European subsidiaries.[3] See Compl. ¶¶ 1, 3, 20-22.

Plaintiffs brought this action against four identified Defendants, namely, Qwest, two former KPNQwest's directors and KPNQwest's former CEO.[4] See id. ¶¶ 22-25. In their Complaint, Plaintiffs alleged that KPNQwest was injured by

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[3] The total number of these entities appears to be around 130. See Compl. ¶ 20. KPNQwest offered its services in 15 European countries. See id. ¶ 21.

[4] Plaintiffs also named defendants 1-10 who, three years after initiation of this action, (a) remained unidentified by Plaintiffs, and (b) were not served by Plaintiffs. It appears from Plaintiffs' Opposition that Plaintiffs could eventually decide to name "all relevant current and former Qwest employees responsible for fraud" as such defendants, see Opposition at 23-24; however the record reveals that Plaintiffs neither named these parties as defendants nor served them. In view of this Court's decision to grant Defendants' Motion, this Court dismisses Plaintiffs' claims against Defendants 1-10 for lack of prosecution.

"fraud, deceit, corporate mismanagement and other misconduct of Defendant[s]," id. ¶ 1, and clarified that (a) "Defendants' fraud and mismanagement result[ed] in KPNQwest's resulting increasing insolvency and bankruptcy," id. at 67-96, and (b) KPNQwest's injuries were amplified by Defendants' "fraud and looting."[5] Id. at 97-103. Plaintiffs based their choice of venue on the domicile of two Defendants, that is, KPNQwest's former CEO and one of the directors, and asserted that the United States was the proper forum because: (1) "[s]ignificant U.S. interests are at stake in this dispute [since] much of the . . . alleged [wrongdoing] occurred in the United States"; (2) four KPNQwest Board meetings took place somewhere in the U.S.; and (3) while being at unidentified locations somewhere in the U.S., Defendants participated in five conference calls of non-U.S. KPNQwest's Board's meetings. See id. ¶¶ 23, 25, 28.

In response to Plaintiffs' Complaint, Defendants' Motion asserts that (1) one group of Plaintiffs' allegations is, effectively, a Racketeer Influenced and Corrupt Organizations ("RICO") claim "expressly barred by the Private Securities Litigation Reform Act of 1995 ('PSLRA')," 18 U.S.C. § 1964 (c), Mot., Mem. at 1, and (2) all other claims

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[5] On September 21, 2006 Plaintiffs filed their Amended Complaint (hereinafter "Amended Complaint"), which elaborated on the very same alleged wrongdoings.

are

> Dutch law claim[s that belong in] the Netherlands, where KPNQwest was organized and headquartered[,] and where a Dutch court oversees its bankruptcy. . . . The events preceding KPNQwest's bankruptcy are already the subject of a separate litigation, an arbitration, and an investigatory proceeding that are all pending in the Netherlands.

Mot., Mem. at 2, Defendants further state that, regardless of whether or not the RICO claim is deemed viable,[6] Defendants are entitled to dismissal

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[6] This Court expresses no opinion as to whether Plaintiffs' RICO claim is viable or not. See Alnwick v. European Micro Holdings, Inc., 29 Fed. Appx. 781, 784 (2002) (citing Gilbert and noting that a district court should not consider the viability of the claims on a motion to dismiss for forum non conveniens). On September 28, 2006, in response to Plaintiffs' Amended Complaint, Defendants notified this Court of Defendants' intend to file a supplemental brief with respect to Defendants' instant Motion, see Docket Entry No. 85, apparently to address Plaintiffs' elaboration on the RICO claim. However, this Court *cannot* sever the case into "local" and "foreign" claims for the purpose of (1) dismissing the RICO claim as a matter of law, and then (2) dismissing the remaining Dutch law claims

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on the grounds of forum non conveniens since: (1) "this case is about the demise of a Dutch company that did business in the Netherlands, not in New Jersey," id. at 10; (2) "the majority of the relevant documents and witnesses are in the Netherlands," id.; (3) "the Netherlands [has interest in] resolution of the issues relating to the causes of KPNQwest's bankruptcy, [and] certain Dutch KPNQwest['s] shareholders have [already] initiated proceedings [against the Defendants named in this actions, as well as against numerous Dutch parties, like KPNQwest's accountants, auditors, controlling banks and KPNQwest's Dutch officers and directors] before . . . a commercial [division of the] court in the Netherlands [on the basis of] allegations of corporate mismanagement," the very claim set forth in the case at bar, id. at 10-11 (citing Decl. of Maarten Das

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on the grounds of forum non conveniens. Compare Mot. at 2, 9-10 (suggesting exactly that scenario). "[T]he doctrine of forum non conveniens is intended to avoid trial in inappropriate forums, not to avoid meritless suits," and could be employed *only* with respect to the entire case, not individual claims. Alnwick, 29 Fed. Appx. at 784 (citing Manu Int'l. S.A. v. Avon Products, Inc., 641 F.2d 62, 68 (2d Cir. 1981)); Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 770 (9th Cir. 1991) (citing Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1452-53 (9th Cir. 1990)).

¶ 9 (hereinafter "Das Decl.")),[7] and (4) Plaintiffs,

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[7] Defendants' submission is accompanied by Declaration of Mr. Maarten Das, "an attorney with the law firm of Loyens and Loeff N.V., [located in] Amsterdam, Netherlands." Das Decl. ¶ 1. Mr. Das holds a legal degree from the Vrije Universiteit of Amsterdam and is the head of the Litigation Department of the Corporate Practice Group at his firm. Id. ¶¶ 3-4.

With respect to the Dutch proceedings initiated by the Dutch shareholders (hereinafter "De Vereniging van Effectenbezitters Proceedings" titled after the lead plaintiff in that matter), the Declaration provides an exhaustive list of parties already involved expected to be involved in that action, see Das Decl. ¶¶ 10, 12 (naming the total of 47 parties, all of which, except for the Defendants in this action, are located either in the Netherlands or in the United Kingdom), and explains that the Dutch court also ordered Plaintiffs to appear in that action. Id. ¶ 11.

Moreover, on September 13, 2006, KPNQwest's lenders and their assignees initiated another action in the Netherlands against three of the Defendants in this action (a) raising virtually the same claims as those presently asserted by Plaintiffs and, in addition, (b) naming other defendants, six of whom are residing in Netherlands, one in the United Kingdom, and six in the United States (specifically, in the states of Colorado, New York, Missouri,

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Dutch attorneys, have no interest in pursing their claims in New Jersey. See id. at 11.

DISCUSSION

I. Doctrine of Forum Non Conveniens

Forum non conveniens is Latin for "inconvenient forum." The common law doctrine of forum non conveniens arose from the doctrine of forum non competens developed in Scotland in the early 19th century as a discretionary device designed to allow trial courts to decline to exercise jurisdiction when it appeared that the convenience of the parties and the interests of justice would be better served if another court heard the action. Similarly, the modern doctrine of forum non conveniens is a common law principle that gives courts the discretion to decline exercising jurisdiction over certain cases where the underlying principles of justice and convenience favor dismissal. In 1947, United States Supreme Court announced the factors to be considered in applying the doctrine of forum non conveniens in Gulf Oil Corp. v. Gilbert, 330 U.S. 501. In 1981, the Court further explained the

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Georgia, New Jersey and Virginia). See Letter from Thomas C. Curtin of Sep. 13, 2006, Ex. Cargill Financial Markets, PLC. And Citibank, N.A., v. KPN Telecom B.V., et al. (hereinafter "Cargill Financial Proceedings").

doctrine in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

The Piper decision responded to the world's legal and economic developments. See id. at 244-49. The Court in Piper addressed foreign forum shoppers by giving little deference to their decision to litigate in the United States and redefined the doctrine as a balancing test. See id. at 249-50. Basically, the Piper Court utilized a two-prong analysis: (1) whether an adequate alternate forum was available; and (2) if so, whether the balancing of the private and public convenience factors weighed heavily in favor of litigation in the alternate forum. [8] See Piper, 454 U.S. at 247-52.

The defendant, as the moving party, bears the burden of proof on both these matters. See id. at 258 ("Of course, defendants must provide enough information to enable the District Court to balance the parties' interests"). Once the defendant has satisfied the threshold requirement by illustrating that an adequate alternate forum is available, the courts should balance convenience interests. See id. at 247-52. When considering this second prong, the courts utilize the balancing test introduced in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), which was later reaffirmed in Piper. See Piper, 454 U.S. at 248-

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[8] The availability of an adequate alternate forum was a threshold requirement; consequently, if it was not met, dismissal could not be proper. See Piper, 454 U.S. at 254, n.22.

52, 255-56. In a nutshell, the courts weigh the potential burden of litigation on the parties and on the chosen forum against dismissal. See id. at 255. The Court in Gilbert categorized the convenience factors pertaining to the parties as private interests and those relating to the forum as public interests.[9] See id. at 241 n.6 (discussing the Gilbert decision). If an adequate alternate forum is available and these private and public interests favor dismissal, the court will grant the motion for dismissal under the doctrine of forum non conveniens. See id. at 241.

The courts, however, do not conduct their analysis in a vacuum. They conduct their balancing in light of the degree of deference the plaintiff's choice of forum deserves. The court's deference for the plaintiff plays a significant role in defining the

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[9] In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, and Koster v. Lumbermen's Mutual Casualty Co., 330 U.S. 518, two 1947 cases, the United States Supreme Court established the framework for forum non conveniens analysis by setting forth the private and public interest factors to be considered in the discretionary application of the doctrine. These interests include: (1) the relevant public and private interests; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process for the attendance of unwilling, and the cost of obtaining attendance of willing witnesses; and (4) the ease, speed, and expense of trial; and (5) the enforceability of judgment, if obtained.

weight of the defendant's burden in satisfying the second prong. See id.

Generally, courts view the plaintiff's choice of forum with great deference. See id. at 255. Where a plaintiff sues in plaintiff's home forum, it is presumed that the plaintiff chose the forum for the sake of convenience. See id. at 255-56. The defendant may rebut this presumption, however, and a court may exercise its discretion to dismiss the case where: (1) an alternative forum with jurisdiction over the case exists; and (2) to litigate in the plaintiff's chosen forum would result in "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or where the court's "administrative and legal" concerns make the chosen forum inappropriate. See id. at 241 (quoting Koster, 330 U.S. at 524). Alternatively, since the deference for the plaintiff's choice of forum is grounded in considerations of convenience, the defendant may overcome this presumption in favor of the plaintiff's choice by showing that a balancing of the private and public interest factors "clearly points towards trial in the alternative forum." See id. at 255.

Conversely, in accordance with the doctrine of forum non conveniens and its objective to "ensure that the trial is convenient, a foreign plaintiff's choice [of forum] deserves less deference [than that of an American plaintiff]." Piper, 454 U.S. at 256. It is rational to assume that U.S. plaintiffs choose their home forum for the sake of convenience, but that is not the case when a foreign plaintiff chooses an

American jurisdiction. See id. To the contrary, such suits are counterintuitive in terms of convenience. Consequently, courts are suspicious that a foreign plaintiff's decision to bring suit in the United States is motivated by a search for a jurisdiction with laws that would be the most favorable for the claim. See Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 654, 697 (1950) ("Suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners"). Indeed, the Court in Piper rephrased its earlier holding in Gilbert to explicitly address plaintiffs "shopping" for a forum.[10] See Piper, 454 U.S. at 249 n.15 & 252

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[10] American courts are appealing to foreign plaintiffs. With so many American states to choose from, the number of inviting jurisdictions is abundant, and since each applies its own choice-of-law rules, the forum shopping plaintiff can find just the right fit. Another appealing aspect of American courts is the availability of jury trials, in comparison to civil law jurisdictions. See Piper, 454 U.S. at 252 n.18. In addition, litigation in U.S. courts is more affordable because plaintiffs have the option of using contingent fees, which are rarely available in foreign jurisdictions. See id. Furthermore, absent fee shifting statutes or sanctions for misconduct, U.S. courts do not impose a monetary penalty in the form of attorney's fees on the losing party, see id., a practice common to civil law courts. Moreover, unlike common law legal regimes, civil law

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n.19. It stated that dismissal under forum non conveniens may be "warranted where a plaintiff chooses a particular forum[ ] not because, it is convenient, but solely in order to harass the defendant or take advantage of favorable law." Id. at 249 n.15. To illustrate, the Court in Piper noted that an appointed representative of a foreign estate is presumed to take advantage of the American courts if the action is filed in U.S. mainly because of the legal standards available here."[11] See id. at 239-40

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jurisdictions allow neither punitive nor treble damages. See Michael Van Hoof, Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison, 19 Conn. J. Int'l L. 659 (2004); Mathias Reimann, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?, 51 Am. J. Comp. L. 751 (2003). Finally, the United States is a more attractive forum because of the extensive discovery process unavailable in civil law jurisdictions. See Piper, 454 U.S. at 252 n.18. All in all, these qualities of U.S. courts make them a prime choice for plaintiffs seeking damages from around the world, and Plaintiffs in this case expressly state Plaintiffs' preference for having a jury--rather than a bench--trial, see Opposition at 20, and for engaging in an extensive – rather than in a limited – discovery. See id. at 18.

[11] The Second Circuit, in Iragorri v. United

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& n.3, 242.

As the doctrine stands now, the threshold requirement in any forum non conveniens dismissal is still the availability of an adequate alternative forum. See id. at 254 n.22. Two conditions must be satisfied to meet this adequacy requirement: (1) the defendant must be amenable to process in the alternative forum, and (2) the subject matter of the lawsuit must be cognizable in the alternative forum in order to provide the plaintiff with a redress. See id.; Lacey v. Cessna Aircraft Co., 862 F. 2d 38, 44 (3d Cir. 1988); Kultur Int'l Films v. Covent Garden

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Technologies Corp., 274 F.3d 65 (2001), stated that the degree of deference due to plaintiff's choice of forum moves along a "sliding scale," depending on the circumstances of each case. Id. at 71. Plaintiff's choice of forum receives greater deference when it is motivated by "reasons that the law recognizes as valid," and the plaintiff has a "bona fide connection" with the United States and the chosen forum. See id. at 72. Consequently, the more reasons plaintiff gives the court to assume that plaintiff's choice was based on convenience, the steeper defendant's uphill battle will be to overcome the court's deference for plaintiff's choice. See id. If, however, plaintiff's choice of forum cannot be supported by "bona fide connections," the choice of forum warrants less deference and it will be easier for defendant to prevail on a motion to dismiss.

Pioneer, FSP., 860 F. Supp. 1055, 1063 (D.N.J. 1994). In "rare circumstances" where the remedy available in the other jurisdiction is "clearly unsatisfactory," the threshold requirement will not be met and the court will find dismissal improper. See Piper, 454 U.S. at 254; compare Tom McNamara, International Forum Selection and Forum Non Conveniens, 34 Int'l Law. 558, 560-61 (2000) (providing the list of the 13 foreign forums that U.S. courts have consistently deemed as adequate alternate forums in 1999: Canada, Cayman Islands, Columbia, France, Germany, Greece, Hong Kong, Liechtenstein, Netherlands, Pakistan, Peru, Switzerland, and the United Kingdom). Hence, while the foreign forums completely prohibiting any meaningful "litigation of the subject matter" disputed cannot qualify as adequate alternatives, Piper, 454 U.S. at 254 n.22, the unavailability of a certain theory for recovery or the possibility of lesser damages cannot render the alternate forum inadequate.[12] See id. At 255. For example, the

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[12] True, differences in the laws may affect the likelihood of recovery. Therefore, plaintiffs frequently argue that the less favorable laws that apply in an alternate forum render that alternate forum "inadequate." Such disparities between the laws of the chosen and alternative forums, however, do not render the alternate forum inadequate. See Piper at 250. The "unfavorable" laws of the alternate forum may be given substantial weight only if the laws render the available remedy "so

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Court in Piper held that the alternate forum was not inadequate where there was "no danger that [plaintiffs would] be deprived of any remedy or treated unfairly." Id. In sum, the first prong of the forum non conveniens doctrine does not obligate the courts to "conduct[ ] complex exercises in comparative law." Id. at 251. In fact, the Piper Court favored dismissal where the court would have to engage in "untangling problems in conflict of laws, and in law foreign to itself."[13] See id.

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clearly inadequate or unsatisfactory that it is no remedy at all." Id.

[13] While the Supreme Court in Piper did not address the issue of international treaty-based treatment of foreign national plaintiffs in U.S. courts, the Second Circuit in Iragorri stated that the court's "analysis [should be] mindful of those considerations." Iragorri, 274 F.3d at 69 n.2. In Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64 (2d Cir. 2003), the Second Circuit reaffirmed its earlier assertion that a court must consider relevant treaty obligations when reviewing a forum non conveniens motion. See id. at 76-77. First, the court must determine whether the treaty entitles the foreign plaintiffs to a general access to American courts. See id. at 72. Then, the treaty should be examined to determine whether the court should afford the foreign plaintiff the same deference it gives U.S. plaintiffs who choose to litigate in their

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The second prong is currently summarized as the sum of two multi-element inquiries. The public interests to be considered include: (1) having local disputes settled locally; (2) avoiding problems of applying foreign law; and (3) avoiding burdening jurors with cases that have no impact on their community. The private interests embrace: 1) ease

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home forums. See id. at 72-73. Courts must adhere to the "explicit" provisions of a treaty, meaning that a court will view a foreign plaintiff's choice of the U.S. forum with little deference where the treaty simply provides for "reciprocal free access" to the courts and does not explicitly provide for "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." Id. In other words, a treaty that calls for "freedom of access" cannot be construed to provide "national access" and will only "merit[ ] the lesser degree of deference typically afforded foreign plaintiffs." Id. at 73. Thus, courts should limit the number of foreign plaintiffs they treat with the deference due to U.S. plaintiffs to cases where the applicable treaties explicitly provide for national access. Id. at 72, see also Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 91-92 (2d Cir. 1984) (stating that "under the terms of a separate treaty between the United States and Ireland, appellant was entitled to national treatment with respect to . . . having access to the courts of justice") (internal quotation marks omitted).

of access to evidence; (2) the cost for willing witnesses to attend trial; (3) the availability of compulsory process; and (4) other factors that might shorten trial or make it less expensive. See Capital Currency Exch. v. National Westminster Bank PLC, 155 F.3d 603, 609 (2d Cir. 1999) (citing Piper, 454 U.S. at 241; Gilbert, 330 U.S. at 508); Hoffman v. Goberman, 420 F.2d 423 (3d Cir. 1970); see also Dole Food. Co. v., Watts, 303 F.3d 1104, 1119 (9th Cir. 2002). The inquiry conducted by the court must be detailed and fact-specific, since forum non conveniens remains an exceptional tool to be employed sparingly. See Tech. Dev. Co. v. Onischenko, 174 Fed. Appx. 117, 121 (3d Cir. 2006).

II. Application of the Doctrine to the Case at Bar

A. DEGREE OF DEFERENCE TO PLAINTIFFS' CHOICE OF FORUM

Prior to examining the forum non conveniens factors expressly set forth in Piper and Glibert, this Court should approximate the degree of deference due to Plaintiffs' choice of forum. "Where . . . the plaintiff is foreign, the amount of deference is potentially less because a court cannot assume that the forum was chosen based on convenience factors." Onischenko, 174 Fed. Appx. at 120-21 (citing Piper, 454 U.S. at 255-56). However, Piper is "not an invitation to accord a foreign plaintiff's selection of an American forum no deference," Lacey v. Cessna Aircraft Co., 862 F. 2d 38, 45-46 (3d Cir. 1988) (internal quotation omitted), and "where a foreign plaintiff has made a strong showing of convenience,

. . . the district court must indicate how far that showing goes toward putting the foreign plaintiff on the same footing as a domestic plaintiff." Lony v. E. I. Du Pont de Nemours & Co., 886 F.2d 628, 634 (3d Cir. 1989).

In the case at bar, there appears to be no dispute that Plaintiffs, Dutch attorneys appointed by a Dutch court to act as bankruptcy trustees for a Netherlands-based entity, are indeed foreign plaintiffs that have neither personal nor business contacts with United States or the State of New Jersey.[14] Such lack of contacts, while indeed an important factor, does not, however, mean that this Court cannot accord significant weight to Plaintiffs' forum selection, since a foreign plaintiff without a connection to the forum, while not entitled to the same deference as a domestic plaintiff who chooses his home jurisdiction, does not automatically receive the lowest level of deference. See Onischenko, 174 Fed. Appx. At 122 (citing Lacey v. Cessna Aircraft Co., 932 F. 2d 170 (3d Cir. 1991), Lony, 886 F.2d 628, and Norex Petroleum, Ltd. v. Access Indus., 416 F. 3d 146 (2d Cir. 2005)). Rather, this Court considers

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[14] This Court is aware of no bilateral or multilateral Treaty of Peace, Friendship, Navigation and Commerce (hereinafter "FNC treaty") granting the Netherlands nationals "national treatment" for the purposes of access to this nation's courts, and Plaintiffs similarly do not assert that, under any FNC treaty, Plaintiffs qualify for "national access."

whether "there is some evidence of convenience, even if it is not in the form of the foreign plaintiff's direct contacts to the forum." Id.

Here, however, there appears to be little evidence of any convenience to Plaintiffs. Plaintiffs are legal appointees who seem to have no intention of moving their personal or business interests into the United States (or to the state of New Jersey in particular), and their operation as KPNQwest's bankruptcy trustees has no connection with the United States but for the litigation at bar.[15] See Compl. ¶ 1; compare Onishenko, 174 Fed. Appx. at 122 (suggesting that, when plaintiff is transferring plaintiff's business to the United States, plaintiff's intention to make the United States plaintiff's home and key place of operation should be considered as an indication of certain plaintiff's conveniences for

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[15] Indeed, Plaintiffs' interest in the matter are limited solely by the appointment they obtained from the Dutch court. When the original plaintiff J. C. van Apeldoorn resigned from his position as KPNQwest's bankruptcy trustee, he was substituted by his successor trustee, Marcel Windt. See Docket Entry No. 79. It appears that Mr. Van Apeldoorn's interest in any litigation in the United States immediately extinguished upon his resignation, and that Mr. Windt's interests in such litigation arose only upon Mr. Windt's appointment and are likely to continue just as long as Mr. Windt's appointment lasts.

the purpose of initiating a law suit in the United States.

In addition, there is no doubt that Plaintiffs can bring this action in the Netherlands, their home jurisdiction, and do so with confidence that the local court would entertain the action, and that jurisdiction over Defendants would be properly obtained, since a related action (De Vereniging van Effectenbezitters Proceedings) was already pending against Defendants in the Netherlands at the time when Plaintiffs commenced the instant case. See Das Decl. ¶¶ 9-11, 14-17 (listing applicable legal bases under the Dutch law); see also Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, 658 U.N.T.S. 163.[16]

In fact, the De Vereniging van Effectenbezitters Proceedings,[17] as well as the

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[16] The treaty opened for signature November 15, 1965. Both the United States and the Netherlands are among the twenty-seven ratifying signatories of the treaty which is deposited for custodial holding at the Ministry of Foreign Affairs of the Netherlands.

[17] Plaintiffs appear to assert that the nature of claims in these Proceedings is unrelated to the case at bar, since one of the litigations (presumably De Vereniging van Effectenbezitters Proceedings) is an insurance coverage case. See Opposition at 29.

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Cargill Financial Proceedings[18] filed against

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However, Plaintiffs' points are of little relevance to the issue at hand, since Defendants do not assert that the instant case should be dismissed as duplicating an ongoing case in the Netherlands.

[18] Plaintiffs' submissions do not clarify the caption and index of the insurance coverage case, see note 17, supra. To make matters more confusing, Plaintiffs also assert that a certain other litigation is a petition for "investigatory proceeding," not a law suit. See Opposition at 29. It is not entirely clear to this Court whether this "investigatory proceeding" is the one that has become the Cargill Financial Proceedings on September 13, 2006. In any event, the Cargill Financial Proceedings are, indeed (1) a law suit, and (2) set forth claims *virtually identical* to those raised by Plaintiffs. Finally, the Court notes in passing that Plaintiffs' assertion that an "investigatory proceeding" in the Netherlands cannot be a law suit is erroneous in the sense that an investigatory process is an indelible part of civil law legal proceedings since, in civil law jurisdictions, the legal system is inquisitory (rather than adversarial, as it is in common law jurisdictions) and, hence, has to involve an "investigatory process." See, e.g., Russell G. Pearce, Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 Fordham L. Rev. 969, 971 (2004) (contrasting the inquisitorial system

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Defendants on September 13, 2006, see note 4, supra, and the ongoing Dutch bankruptcy proceedings of KPNQwest, underscore the unusual scenario presented in this case. It is illogical for a bankruptcy trustee to assert that it would be more convenient to bring an action thousands of miles away, while this trustee (a) has to play a part in the related bankruptcy proceedings in his home forum, and (b) has his defendants already brought into his home forum on two other actions which are nearly identical in nature to the action the trustee desires to pursue, and in one of which the trustee has already been ordered to appear. Since one can hardly perceive any convenience in having multiple massive litigations on both sides of the Atlantic, this Court discerns little evidence of convenience to Plaintiffs in Plaintiffs' decision to file this action with this Court and, thus, accords Plaintiffs' forum selection a low degree of deference. See Onischenko, 174 Fed. Appx. at 122.

B. AVAILABILITY OF AN ADEQUATE ALTERNATIVE FORUM

In order to establish whether the Netherlands present an adequate alternative forum, Defendants

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where judges are experts who "conduct investigations, initiate cases, determine the issues, and control the presentation of evidence" with the adversarial system, where lawyers "search for justice" and initiate cases upon their clients' behalf).

should show that (1) Defendants are amenable to process in the Netherlands, and (2) the subject matter of Plaintiffs' lawsuit is cognizable in the Netherlands and provides Plaintiffs with a redress. Defendants made both of these showings.

There appears to be no dispute that Defendants could, and were, served with process by entities having similar legal status as Plaintiffs in both De Vereniging van Effectenbezitters Proceedings and Cargill Financial Proceedings, see Das Decl. ¶¶ 9-10; Letter of Thomas R. Curtin of September 13, 2006, Ex. Cargil Financial Proceedings; and Plaintiffs' Opposition is silent as to Plaintiffs' inability to serve or any hardship with respect to serving Defendants with process if Plaintiffs were to initiate a Dutch action.

Moreover, Defendants aver, by and through the Declaration of Mr. Das, that

> [i]f [Plaintiffs-] Trustees were to sue [Defendants] in the Netherlands under [theories fostered by Plaintiffs in the instant action, and] Defendants are domiciled in the United States, all Defendants would be subject to the jurisdiction of the Courts of the Netherlands. [In addition,] Qwest, as an alleged de facto policymaker in KPNQwest, a Dutch company, would be subject to the jurisdiction of a Dutch court on the basis of . . . Section 2:138 [of Dutch Civil Code] in conjunction

> with Section 2:131 [of Dutch Civil Code] or Section 6 [of Dutch Code of Civil Procedure].

Das Decl. ¶¶ 13-14; accord TH Agric. & Nutrition, L.L.C. v. Ace European Group, Ltd., 416 F. Supp. 2d 1054 (D. Kan. 2006) (where a Delaware company having its principal place of business in Kansas litigated against 33 European insurance companies, the court dismissed the lawsuit in favor of the Netherlands because a similar suit had already been filed in the Netherlands).

With respect to the second prong of the adequacy of the alternative forum test, Defendants similarly aver, by and through Declaration of Mr. Das, that

> Dutch law recognizes causes of action for fraud and mismanagement. A claim by a trustee in bankruptcy against the managing and supervisory directors would generally be based on Sections 2:9 and 2:149 Dutch Civil Code ("DCC") (internal liability of the managing directors and supervisory directors vis[-]à[-]vis the company) or on Sections 2:138 and 2:149 DCC (external liability of the managing directors and supervisory directors vis[-]à[-]vis the estate of the barkrupt company). . . . Dutch law [also] recognizes a cause of action for contribution (vrijwaringsvordering)

> against third parties on the basis of Section 210 Dutch Code of Civil Procedure . . . . [The] claims of corporate mismanagement [are filed with] the Enterprise Chamber of the Amsterdam Court of Appeals ("EC"). . . . The EC is a specialized court with jurisdiction to investigate claims of corporate mismanagement of Dutch corporations. [While] damages cannot be claimed before the EC, [damages] can be claimed in subsequent legal proceedings before a Dutch district court.

Id. ¶¶ 6-7, 9.

In view of this evidence, this Court concludes that the Netherlands presents an adequate alternative forum for Plaintiffs, action.[19] See Tom

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[19] Moreover, it appears that, under the Dutch law, non-Dutch parties would be able to join Plaintiffs in their Dutch action against Defendants. See R.D. Kollewijn, American-Dutch Private International Law 30 (2d ed. 1961) ; Van Rene van Rooij & Maurice V. Polak, Private International Law in the Netherlands 50, 53 (1987); J.P. Verheul, Private International Law, in Introduction to Dutch Law for Foreign Lawyers 263, 280 n.88 (D.C. Fokkema et al. eds., 1978).

Finally, there is little doubt that Plaintiffs

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McNamara, International Forum Selection and Forum Non Conveniens, 34 Int'l Law. 558, 560-61 (2000) (listing the Netherlands as the forum consistently found adequate for the purposes of forum non conveniens dismissals); accord Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368 (5th Cir. 1992)

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would be able to enforce the award, if such is rendered in their favor by the Dutch court, in the United States. The United States professes liberal policies with respect to foreign judgments in most situations. See generally Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 263 (1986) (setting forth liberal policies for accepting foreign judgments). The Uniform Foreign Money Judgments Recognition Act is currently accepted in thirty states, the District of Columbia and the Virgin Islands. See Uniform Law Commissioners, A Few Facts About the Uniform Foreign Money Judgments Recognition Act (listing current status of acceptance of the Act), available at <<http://www.nccusl.org/nccusl/uniformactfactsheets/uniformacts-fsufmjra.asp>>; Restatement (Third) of Foreign Relations 481-486 (1987) (generally paralleling relevant provisions within the Uniform Foreign Money Judgments Recognition Act); Restatement (Second) of Conflict of Laws 98 (1971) ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States").

(affirming dismissal in favor of the Netherlands on the grounds of forum non conveniens); Veba-Chemie A.G. v. M/V Getafix, 711 F. 2d 1243 (5th Cir. 1983) (same); Morales v. Ford Motor Co., 313 F. Supp. 2d 672 (S.D. Tex. 2004) (dismissing in favor of the Netherlands on the grounds of forum non conveniens); Bouvy-Loggers v. Pan Am. World Airways, Inc., 1978 U.S. Dist. LEXIS 18792 (S.D.N.Y. Mar. 27, 1978) (same); see also Alnwick v. European Micro Holdings, Inc., 281 F. Supp. 2d 629, 647 (E.D.N.Y. 2003) ("It is undisputed that the Netherlands is an adequate alternative forum").

C. BALANCE OF PUBLIC INTERESTS INQUIRY

The public interests to be considered include: (1) having local disputes settled locally; (2) avoiding problems of applying foreign law; and (3) avoiding burdening jurors with cases that have no impact on their community. Plaintiffs argue that

> [s]ignificant U.S. interests are at stake in this dispute. . . . Much of the fraudulent conduct' and mismanagement alleged herein occurred in the United States. . . . Moreover, numerous persons or entities with substantial interests in the estate, including creditors and bondholders, reside in the United States.
>
> The United States has a substantial interest in redressing fraud

> committed from within its borders. In addition, this Court would be more familiar with the relevant law - RICO - which is a unique U.S. statutory provision. Although [Plaintiffs] assert a Dutch law claim, "more than half of the complaint involves RICO claims that are governed by federal law . . . ."

Am. Compl. at 9-10; Opposition at 27-28.

It appears that Plaintiffs misread the applicable tests. The interest of having local disputes settled locally (1) should be read jointly with that of avoiding burdening jurors with cases that have no impact on their community, and (2) focuses on the nature of the dispute and the effect that the outcome might have on the community of the *local* jurors. The gist of the case at bar concerns the allegations of fraud and mismanagement of a Dutch business entity by a board member and executives of *that* corporation, and by *that* corporation's controlling holder. The fact that two of these defendants are domiciled in the state of New Jersey does not transform the case into a "local dispute," same as the facts that four Board meetings took place somewhere in the United States and Defendants, while being present in the United States, took part in five international conference calls, cannot transform the case into an "American" dispute. If this Court were to find otherwise, any business transaction involving a meeting in the United States, a telecommunication from the United

States or an American executive would automatically be "Americanized" for the purposes of litigation if the transaction eventually goes sour, making the United States federal court system the surrogate court for the entire modern world global economy.

The interest of having disputes settled locally and avoiding burdening jurors with cases that have no impact on their community focuses on the effect that the resolution of the case would have on the *local* community, its citizenry, its domestic financial markets, and so on. Therefore, the United States and the community of the District of New Jersey have little interest in the resolution of this case.[20]

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[20] Plaintiffs assert that, "[w]hile KPNQwest kept its books in accordance with Dutch generally accepted principles ('Dutch GAAP', which required the record to be 'true and fair' reflection of the company's financial condition, KPNQWest published its reports in accordance with United States generally accepted accounting principles ('US GAAP') and purported to make its financial disclosure in accordance with the laws of the United States." Compl. at 11. Leaving aside the ambiguity of Plaintiffs' allegation that KPNQwest "purported to make its financial disclosure in accordance with the laws of the United States" without clarification as to whether KPNQwest succeeded in these efforts, this Court finds Plaintiffs' argument irrelevant to the inquiry at bar, since US GAAP, one of the most

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Compare Dole Food Co. v. Watts, 303 F.3d 1104 (9th Cir. 2002) (where a local corporation alleged that the officers had engaged in an elaborate scheme to defraud it, the court found that intentional wrongful conduct targeted the economic health of the local community and declined to affirm the dismissal based on the doctrine of forum non conveniens). Conversely, the Netherlands has strong contacts with this case, since that country has substantial

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stringent set of accounting rules in the world, as well as the strict regulatory regime set forth by United States securities laws and the rigorous rules of American stock exchanges substantially exceed the accounting and disclosure requirements of their European counterparts. See, e.g., Kenji Taneda, Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation, Colum. Bus. L. Rev. 715 (2003); Roberta S. Karme, Will Convergence of Financial Disclosure Standards Change SEC Regulation of Foreign Issuers?, 26 Brooklyn J. Int'l L. 485 (2000); Christopher J. Mailander, Searching for Liquidity: United States Exit Strategies For International Private Equity Investment, Am. U. Int'l L. Rev. 71 (1997). Thus, Defendants could not have made themselves implicitly amenable to a local litigation by taking advantage of less stringent local rules, since American accounting and disclosure requirements are more stringent than the Dutch ones.

interests in adjudicating claims brought by the trustees of its own corporation (which was created as a joint-venture with another Dutch corporation), especially in view of the bankruptcy effect suffered by the local Dutch community consisting of KPNQwest's employees, shareholders, consumers of KPNQwest's product, as well as KPNQwest's suppliers and creditors. While indeed there could be creditors and similarly situated parties in the United States, and even in the state of New Jersey, an international dispute, by definition, presumes such scenario.[21]

Finally, Plaintiffs assert that, since some of Plaintiffs' claims are based on RICO, the familiarity of this Court with this "unique . . . statutory provision" renders this Court a more competent forum than the Enterprise Chamber of the Amsterdam Court of Appeals, or a like Dutch court, even though Plaintiffs "assert a Dutch law claim."[22]

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[21] Indeed, had it been otherwise, the forum non conveniens issue would have not surfaced at all. In case of an international dispute, where interested parties and witnesses are scattered all over the world, the factor of "multinationality" can neither be squarely resolved in favor of any single country nor serve as a decisive element.

[22] It shall be noted, however, that Plaintiffs assert at least *two legal theories* under Dutch law: mismanagement and breach of fiduciary duty, and allege that these wrongdoings were made in

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Opposition at 28. This Court disagrees. Federal courts have not afforded claims under federal securities law or RICO any special forum non conveniens treatment, and this Court has no reason to refuse to following suit. See Gemini Capital Group v. Yap Fishing Corp., 150 F.3d 1088, 1092 (9th Cir. 1998) (dismissing the case involving RICO claims on the grounds of forum non conveniens); Alfadda v. Fenn, 159 F.3d 41 (2d Cir. 1998) (same); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 771 (9th Cir. 1991); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 952 (11th Cir. 1997); Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1143-44 (5th Cir.), cert. denied, 493 U.S. 918 (1989); Alfadda v. Fenn, 159 F.3d 41 (2d Cir. N.Y. 1998); Transunion Corp. v. Pepsico, Inc., 811 F.2d 127, 129 (2d Cir. 1987) (per curiam); Tkachyov v. Levin, No. SS C3120, 1999 WL 782070, at 7-9 (N.D. Ill. Sep. 27, 1999); Trujillo v. Banco Cent. Del Ecuador, 35 F. Supp. 2d 908, 911-16 (S.D. Fla. 1998); BCCI Holdings (Luxembourg), S.A. v. Mahfouz, 828 F. Supp. 92, 95-100 (D.D.C. 1993); Capri Trading Corp.

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violation of *eleven statutory provisions* of the Dutch Civil Code. See Compl. at 119-20. It is not entirely clear to this Court why Plaintiffs designate the RICO statute "unique" and requiring special expertise, while deeming the eleven statutes of Dutch Civil Code "commonplace" and requiring no legal savvy.

v. Bank Bumiputra Malaysia Berhad, 812 F. Supp. 1041, 1044-46 (N.D. Cal. 1993); Penwest Dev. Corp. v. Dow Chem. Co., 667 F. Supp. 436, 437-38 (E.D. Mich. 1987); cf. Richards v. Lloyd's of London, 135 F.3d at 1294-96 (upholding choice of forum clauses to divest federal court of jurisdiction over the plaintiffs' RICO claims and declaring, in dicta, that even a potential "loss of RICO claims does not suffice to bar dismissal for forum non conveniens").

Since (1) this Court has no reason to believe that it is better equipped to deal with eleven Dutch statutory provisions than the Dutch court is to deal with one American statute; (2) the local New Jersey community has virtually no interest in the dispute, while the Netherlands' interest in the matter is very substantial and (3) local jurors would be improperly burdened by the need to resolve a matter having no impact on their community, this Court concludes that the balance of public interests factors heavily favors dismissal of Plaintiffs' Complaint.

D. BALANCE OF PRIVATE INTERESTS INQUIRY

The balance of private interests similarly favors dismissal. The relevant factors to be examined include: (1) ease of access to evidence; (2) the cost for willing witnesses to attend trial; (3) the availability of compulsory process; and (4) other factors that might shorten trial or make it less expensive.

For reasons not entirely clear to this Court, Plaintiffs infuse into the first prong of the inquiry, that is, the ease of access to evidence, the question of

whether substantial discovery has already been conducted. See Opposition at 23. These matters, however, are not the same, and the ease of access to documentary evidence means exactly that: the *ease* of access. Defendants aver that "[m]ost of the evidence . . . relating to causation, injury, and damages . . . is in the Netherlands [not] in New Jersey."[23] Mot., Mem. at 16. While conceding that "there may well be some documents . . . in Qwest's files in Colorado," Defendants maintain that "there are many more documents . . . held by both Plaintiffs and third-parties . . . in the Netherlands" and other locations in Europe. Id. at 17-18 (citing Declaration of Jonathan Sherman, Docket Entry No. 66, Exs. 3-11, listing such documentary evidence as "some two

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[23] Defendants rely on the cases granting dismissal on the grounds of forum non conveniens stating that, where evidence relating to causation, injury and damages is located in alternative forums, dismissal is proper. Specifically, Defendants rely upon Aquinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); De Melo v. Lederle Laboratories, Div. of American Cyanamid Corp., 801 F.2d 1058 (8th Cir. 1986); Miller v. Boston Sci. Corp., 380 F. Sup 2d 443 (D.N.J. 2005); Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117 (S.D.N.Y. 1992); Ledingham v. Parke-Davis Div. of Warner-Lambert Co., 628 F. Supp. 1447 (E.D.N.Y. 1986). This Court agrees with Defendants that the consideration of evidentiary relevance to the matters of causation, injury and damages is a proper one.

thousand boxes of paper documents and two terabytes of electronic data (equivalent to roughly 150 million pages), in a Rotterdam warehouse, documents of KPNQwest's Dutch parent company, Koninklijke KPN N.V., and documents of KPNQwest's auditors and financial lenders, the Netherlands-based financial institutions, as well as affiliates of Pricewaterhouse-Cooper and Arthur Andersen").

Plaintiffs (1) counter Defendants' argument by noting that, while "KPNQwest['s documents] are already (or soon will be) in Qwest's hands [and] many of those documents are available electronically[,] . . . Defendants' documents . . . are in the U.S.," in Colorado; and (2) assert that Defendants' "objective is to limit discovery" by transferring the "litigation [to] the Netherlands, where discovery is limited." Opposition at 23, cf. Reply at 10 ("The parties agree that there are *no* relevant documents in New Jersey," emphasis in original). Plaintiffs, however compare apples and oranges, since the concept of "*ease* of access" is not equivalent to that of "scope of discovery." [24]

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[24] The actual issue at hand, that is, the *ease* of access to documentary evidence, would not be affected if the case is litigated in the Netherlands, since Plaintiffs would still have to produce or make available for examination all Netherland-located documents to Defendants, and Defendants would still have to produce or make available for

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In fact, the scope of discovery available in the Netherlands is not part of the balance of private interests inquiry, it is part of the inquiry examining the adequacy of the alternative forum. Differences in civil procedure of the competing forums are viewed through the prism of whether there is a "danger that [as a result of the alternative proceedings, Plaintiffs would] be deprived of any remedy or treated unfairly." Piper, 454 U.S. at 255.

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examination all Colorado-located documents to Plaintiffs. (Defendants aver that "Plaintiffs refused to produce 2,000 boxes of hard-copy documents in the United States, insisting that Defendants must go to the Netherlands to inspect them," even though Defendants were and are willing to "make . . . documents available in either forum." Reply at 10-11 (citing Second Declaration of Jonathan Sherman, see Docket Entry No. 71)). The expenses and complexity associated with such production and examination appear to be the same regardless of whether the case is litigated in New Jersey or in Amsterdam. While this Court has little problem envisioning a scenario where the physical location of evidence might be of paramount importance, e.g., where the case involves a piece of real estate or non-transportable heavy or sensitive machinery, or a bed-ridden injured person, a "paper-trail" case like the one at bar does not appear to be amenable to substantial fluctuations of the "ease of access" factor.

Concluding otherwise would effectively preclude all forum non conveniens dismissals in favor of any Roman-law-based civil jurisdiction, since all continental European jurisdictions provide for less discovery than that available in common law legal systems. As long as the Dutch legal system provides procedure ample to render a fair decision under the Dutch law, the distinction in the scope of discovery cannot serve as a basis for denial of forum non conveniens dismissal. See Potomac Capital Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V. D/b/a KLM, 1998 WL 9241G, at *1 (S.D.N.Y. March 4, 1998) (finding Dutch procedural safeguards adequate and noting that foreign tribunals, including those in the Netherlands, can seek discovery assistance under 28 U.S.C § 1782, which provides such assistance to foreign tribunals, as well as to litigants before those tribunals); see also Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1124 (S.D.N.Y. 1992) (surveying discovery procedures in Northern Europe, finding these procedures adequate and noting that "the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate").

Finally, if this Court were to entertain Plaintiffs' assertion that the discovery already conducted weighs against dismissal of Plaintiffs' Complaint, the record of this litigation does not support Plaintiffs' assertion. The record indicates that Defendants venomously "opposed discovery pending a final ruling on Defendants' motion to

compel arbitration[, and only when the] order to engage in discovery [was issued by this Court in response to Plaintiffs' motion to compel discovery, Defendants] complied."[25] Reply at 10; accord Docket Entry No. 53 (Plaintiffs' motion for discovery commencement); Docket Entries No. 55-56 (Defendants' oppositions to discovery); Docket Entry No. 59 (Plaintiffs' reply to Defendants' opposition to discovery); Docket Entries No. 61-62 (minutes entry for proceeding on the issue of discovery and this Court's ensuing order granting Plaintiffs' motion for discovery.)[26] It would be indeed anomalous for this

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[25] On July 17, 2005, Defendants filed their motion to compel discovery, see Docket Entry No. 73, asserting that Plaintiffs were not cooperating with--or unduly impeding--Defendants' discovery requests. On August 24, 2006, Defendants filed their motion to compel Plaintiffs to post a security bond, see Docket Entry No. 77, in view of Defendants' (1) right to indemnification under the Articles of KPNQwest, and (2) Defendants' swiftly mounting expenses related to transatlantic discovery. As of the date of the instant Opinion and accompanying Order, these motions are still pending.

[26] The order granting Plaintiffs' motion for initiation of discovery was issued on December 23, 2005, nine months *prior* to this Court's final resolution of the issue whether to compel arbitration of the dispute. See Docket Entry No. 84. Just two months after this Court ordered the parties to engage in discovery, Defendants filed the instant

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Court to allow Plaintiffs to demand and obtain significant discovery just so Plaintiffs would be able to use the very fact of this discovery as a tool to thwart Defendants' Motion.

The next step in the balance of private interests inquiry is to examine two interrelated questions: (1) what would be the cost for willing witnesses to attend trial, and (2) is there a compulsory process in the Netherlands with respect to unwilling witnesses? The answer to the first question weighs heavily in favor of dismissal in view of the ongoing De Vereniging van Effectenbezitters and Cargill Financial Proceedings, since the bulk of the witnesses desired by Plaintiffs (including those witnesses whom Plaintiffs designate as "central" and "relevant," see Opposition at 23-24), same as the bulk of third-parties desired by Defendants are either already engaged in these actions or should, and therefore, probably would be engaged in view of the similarity of the claims. Therefore, the commute and lodging expenses associated with the need to call willing witnesses would be equal or less if only the United States-based witnesses are flown to the Netherlands for various Dutch proceedings in comparison with the scenario where: (a) the United States-based witnesses are flown to the Netherlands for the currently pending Dutch proceedings, *plus* (b)

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Motion seeking dismissal of the grounds of forum non conveniens. See Docket Entry No. 66.

the Netherlands-based witnesses are flown to the United States for this Court's proceeding.

The answer to the second question similarly appears to favor dismissal. Addressing this very issue, Defendants aver, by and through Mr. Das' Declaration, that

> Dutch courts are able and willing to compel testimony of persons located in the United States on the basis of the Hague Convention on [the] Taking of Evidence Abroad in Civil or Commercial Matters ([opened for signatures on] 18 [th of] March, 1970)[27] to which both the Netherlands and the United States are parties. On the basis of this convention, a Dutch court can execute

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[27] The Convention, popularly known as "Hague Evidence Convention," 23 U.S.T. 2555, T.I.A.S. No. 7444, providing the opportunity to depose witness located overseas, was signed, inter alia, by the United States, Austria, Belgium, Canada, Denmark, Spain, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom, Finland, France, Greece, Ireland, Italy, Sweden, Switzerland, Czechoslovakia, and Yugoslavia. See also, Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, 658 U.N.T.S. 163.

> letters of request (rogatory letters) in which they can request the competent authorities in the United States to perform judicial acts in order to collect evidence.

Das Decl. ¶ 7. Therefore, it appears that Plaintiffs would have no more problem in compelling unwilling United States and European witnesses to take part in Dutch proceedings than what Defendants might face in trying to compel unwilling Netherlands-based or other European witnesses to partake in this Court's proceedings.

Finally, the Court shall assess the litigation at bar to determine whether there are any other matters that might affect the balance of private interests by shortening the trial or making it less expensive. This Court is persuaded by Defendants' argument that, since Defendants can and intend to "assert contribution claims against third-parties in the Netherlands and elsewhere in Europe[, this Court should] discourage . . . piecemeal litigation [by] favor[ing the] dismissal." Reply at 12-13. Plaintiffs' counter-arguments that (1) Defendants are yet to sue these third parties, and (2) Defendants could initiate separate suits in the Netherlands against these parties, see Opposition at 23-24, are not persuasive. The fact that the parties intended by Defendants for impleader are already made part to the De Vereniging van Effectenbezitters and Cargill Financial Proceedings suggests the likelihood of Defendants' legal actions against these parties. Moreover, if this Court is to presume that Defendants are to follow Plaintiffs' advice by

initiating *additional* related legal actions, the possibility of a mushrooming cluster of suits in the Netherlands only supports dismissal of Plaintiffs' Complaint, so the court in the Netherlands could execute a joinder of actions, thus shorting the trial processes and making them less expensive. In sum, this Court is convinced that the balance of private interests in terms of ease of access to evidence, cost of litigation, compulsory processes and other factors unambiguously favor dismissal of Plaintiffs' Complaint.

E. OPPRESSIVENESS AND VEXATION TO DEFENDANTS

Finally, Plaintiffs maintain that Defendants "cannot show that proceedings in this Court would be 'oppressive or vexatious,'" Opposition at 18, since Defendants have "not shown a practical inability to proceed here." Id. at 20.

Plaintiffs err. First, an application for dismissal on the grounds of forum non conveniens does *not* require defendant's showing of "inability" to litigate in the inconvenient forum: the "inability" factor was never listed by Piper and Gilbert Courts.

Moreover, under the holding of Piper, the defendant has to make an "oppressive or vexatious" showing *only in case if the plaintiff is suing in plaintiff's home forum*. See Piper Aircraft Co. v. Reyno, 454 U.S. at 241. Since there is no dispute that Plaintiffs in the instant action are *not* suing in their home forum, the "oppressive or vexatious" inquiry is inapplicable to the case at bar. Finally,

even if this Court is to hypothesize that this aspect is, somehow, relevant to the case at bar and conduct the applicable inquiry, Plaintiffs' argument is without merit.

Plaintiffs' "oppressive or vexatious" argument is based on the language of the Third Circuit's case, Lony v. E.I. Du; Pont de Nemours & Co., 935 F.2d 604 (3d Cir. 1991).[28] See Opposition at 18-20. The Lony Court made the observation restated by the Third Circuit in Onischenko:

> [since] most forum non conveniens cases involve a defendant, sued far

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[28] Plaintiffs' two other arguments on this aspect of the inquiry are without merit, since (1) Plaintiffs assert that the Motion was filed solely by Qwest, even though the remaining Defendants joined the Motion prior to filing of Plaintiffs' Opposition, see Docket Entries No. 68, 69, and (2) Plaintiffs claim that Defendants cannot be deemed "oppressed" because Defendants, while seeking to compel arbitration and stay the instant proceedings, utilized the services of counsel located in District of Columbia and New Jersey. This second claim is, at the very least, puzzling, since Defendants' usage of foreign counsel with respect to the claim brought under the Federal Arbitration Act would be indeed unreasonable. Cf. Reply at 10 ("The law does not require a defendant to choose between allowing a default to be taken against him or waiving any argument.")

> from home, arguing against being forced to litigate in a remote forum[, it seems illogical for the defendant to] argu[e] that it would be more convenient for him to defend himself thousands of miles away.

174 Fed. Appx. at 122 (citing Lony, 935 F.2d at 608).

Capitalizing on United States domicile of Defendants, Plaintiffs rely on the language of Lony to assert that, since "[D]efendant[s'] . . . wish[ ] to defend [themseves] in a forum far from [Defendants'] home jurisdiction[, Defendants' wish] is, as Alice said, 'curiouser and curiouser.'" Opposition at 20 (internal quotation omitted). What Plaintiffs fail to observe is that defendants in both Lony and Onischenko were *not* already involved in other, similarly focused, litigations in foreign jurisdictions. Consequently, the Third Circuit questioned the defendants' interest in litigating the claims thousands miles away. Conversely, in the case at bar, Defendants are already involved in two litigations in Amsterdam, and in the very same court that would entertain Plaintiffs' Dutch action if Plaintiffs chose to sue Defendants in the Netherlands. Given these circumstances, it is not surprising that Defendants see Plaintiffs' litigation in New Jersey as "oppressive or vexatious," since Defendants would be forced to stretch their resources over both sides of the ocean by: (1) hiring different counsel to meet two different sets of bar admission requirements and two different sets of procedural rules; (2) losing the opportunity to seek

joinder of actions; (3) flying witnesses and themselves across the Atlantic both ways on regular bars, thus incurring substantial travel and accommodation expenses; and (4) having to translate *all* relevant documents and testimonies,[29] etc. Viewed through the prism of conveniences available to Plaintiffs in Plaintiffs' home forum and potential dire exhaustion of Defendants' resources through a cluster of transatlantic litigations, Plaintiffs' action appears to be "oppressive or vexatious, and the balance of the private and public interest factors "clearly points towards trial in the alternative forum," thus, supporting dismissal. See Piper, 454 U.S. at 241, 255 (suggesting two tests for the cases of domestic plaintiff).

III. Other Plaintiffs' Arguments

In addition to the matters discussed infra, Plaintiffs raise two groups of arguments in support of Plaintiffs' opposition to Defendants' Motion.

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[29] If the instant action is not dismissed, all documents and testimony in Dutch would have to be translated into English for the use of this Court, while all documents and testimony in English would have to be translated into Dutch for the use of the court in the Netherlands. Hence, there would be no document or testimony left untranslated. If, however, this action is brought in the Netherlands, the translation-related time and expenses would be obviously reduced, perhaps by half, by the need to translate *only* the documents drafted in English.

A. UNTIMELINESS

One group of Plaintiffs' arguments prompts this Court to deny Defendants' motion as untimely and relies on In re Air Crash Disaster near New Orleans, 821 F.2d 1147 (5th Cir. 1987), vacated on other grounds, 490 U.S. 1032 (1989), and Lony, 935 F.2d 604.[30]

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[30] Plaintiffs assert that the court in Lony denied the forum non conveniens motion because "two years have elapsed since the case was filed." See Opposition at 17. However, the Lony decision does not state exactly that. Rather, the court in Lony observed as follows:

> The facts that two years have elapsed since the case was filed, there has previously been limited discovery on the forum non conveniens motion, and this was followed after remand by merits discovery for nearly six months present a novel question that does not fit easily into established criteria. This consideration goes to both private concerns, because of the parties' investment in time and money in discovery, and public ones, because the district court and court personnel already have expended resources in connection with this litigation. Lony, 935 F.2d at 613.

See Opposition at 17. However, the court in Air Crash Disaster near New Orleans expressly observed that "untimeliness will not effect a waiver, [although] it ... weigh[s] heavily against the granting of the motion [simply] because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience." 821 F.2d at 1165. In fact, Plaintiffs admit that "a defendant must assert a motion to dismiss for forum non conveniens within a *reasonable time* after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant." Opposition at 17 (quoting Disaster near New Orleans, 821 F.2d at 1165) (emphasis supplied).

This Court finds no undue dilatory tactics on part of defendants. Upon initiation of the case at bar, Defendants immediately moved to compel arbitration in London and stay this action, see Docket Entries No. 30-31, which Plaintiffs opposed, see Docket Entry No. 32, and denial of Defendants' motion to compel arbitration was entered by this Court on June 17, 2005, see Docket Entry No. 46, causing Defendants to appeal that order on July 22, 2005, see Docket Entry No. 51, with Plaintiffs' opposition to the appeal being filed on August 22, 2005. See Docket Entry No. 54. The final resolution, of the issue whether arbitration in London should be compelled was reached only on September 25, 2006. See Docket Entry No. 84. However, Defendants' motion to dismiss Plaintiffs' Complaint on the grounds of forum non conveniens was filed on February 21, 2006, see Docket entry No. 66, that is, seven months *prior* to the final resolution

of the arbitration issue.

It is axiomatic that, since, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), "a very strong presumption in favor of arbitration of international disputes [exists], even where U.S. statutory claims are implicated," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626-27 (1985), and--in view of the interests of judicial economy--the issue whether or not an arbitration should be compelled is always resolved first. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995). Moreover, if a party fails to demand arbitration of an arbitrable dispute and proceeds with acts and incidents typical to litigation, such conduct usually results in a waiver of the party's right to arbitrate. See, e.g., Republic Ins. Co. v. PAICO Receivables LLC, 383 F.3d 341, (5th Cir. 2004); Hunt v. Up North Plastic, 980 F. Supp. 1046 (D. Minn. 1997); Ritzel Comm., Inc. v. Mid-American Cellular, 989 F.2d 966, 969 (8th Cir. 1993); Com-Tech Assocs. v. Computer Assocs. Int'l, Inc., 938 F.2d 1574, 1577 (2d Cir. 1991). Therefore, the period of time when this Court was involved in the resolution of the question whether the arbitration should be compelled cannot count against Defendants if Defendants, in good faith, sought an arbitration and stay of the instant proceedings.

Plaintiffs, however, seem to assert that, "if one intends to seek either arbitration, or dismissal on

[the grounds of] forum non conveniens, those motions [should be] filed together," Opposition at 17, and cite four cases in support of that proposition.[31] See id. n.9. However, *none* of the cases cited by Plaintiffs implies such a rule. In fact, in all those cases it was coincidental that the motions to compel arbitration and to dismiss on the grounds of forum non conveniens were filed together, and a prudent litigant may very well wait with a forum non conveniens motion until the resolution of the arbitration issue.[32] See Garney Cos. v. Southwest

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[31] Specifically, Plaintiffs cite Concat LP v. Unilever PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004); Usha India Ltd. v. Honeywell Intl, Inc., 2004 U.S. Dist. LEXIS 4236 (S.D.N.Y. Mar. 17, 2004); Sandvik AB v. Advent Int'l Corp., 83 F. Supp. 2d 442 (D. Del. 1999); Ibar Ltd. v. American Bureau of Shipping, 1998 U.S. Dist. LEXIS 7792 (S.D.N.Y. May 22, 1998).

[32] Moreover, either the circumstances of these case or the judicial observations made in these decisions, or both, advocate *against* Plaintiffs' current position. For instance, in Concat, the court found that the arbitration agreement did apply to the subtle subject matter of this dispute and granted a motion to stay pending arbitration while noting that, had it not been for the arbitration, the action would have proceeded since the doctrine of forum non conveniens did not justify dismissal because the companies, by the act of filing U.S. patent applications, had exposed themselves to the

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foreseeable possibility of litigation in the United States. In Usha, the defendant domestic corporations contended that the United States court was an inconvenient forum because the claims at issue all arose under the laws of India and most of the events in issue allegedly occurred there. Although the plaintiff foreign corporations asserted that India did not provide an adequate alternative forum since the backlog of cases and continuing court congestion indicated that it would take 10 to 15 years for their claims to be adjudicated, the Usha court dismissed the complaint finding the Indian forum adequate. In Sandvik, the Court noted that the domicile of key witnesses in a certain forum does not render that forum more convenient. See 83 F. Supp. 2d at 450. Finally, in Ibar, a petition to compel arbitration was granted because petitioners had shown that they had standing to enforce the relevant arbitration agreement. (The Court notes, in passing, that forum non conveniens analysis in Ibar is wholly irrelevant to the case at bar, since the issue in Ibar was the transfer of action from one state of the United States, New Jersey, to another state, New York. Forum non conveniens and 28 U.S.C. § 1404(a), a change of venue provision, differ in their purposes, operation, and consequences; though they have common roots in legislation, they are entirely independent phenomena. See Piper, 454 U.S. at 253-54.)

(M.D. Fla. Sept. 14, 1992) (denying motion to compel arbitration on the grounds that the court has already assumed jurisdiction over the case by entertaining the defendant's motion to dismiss on the grounds of forum non conveniens). While Plaintiffs maintain that Defendants' motion to dismiss on the grounds of inconvenient forum unduly "burden[s] the [C]ourt with extensive proceedings to address that motion" after this Court's denial of Defendants' motion to compel arbitration, see Opposition at 17, Plaintiffs' argument has no merit. The analysis employed by this Court to establish whether the dispute at hand should be arbitrated was entirely different from that currently employed with respect to the forum non conveniens inquiry.[33] Indeed, if Defendants were to file both motions simultaneously, the burden on this Court would be identical to the one existing, and it was reasonable for Defendants to preserve this Court's resources by first filing the motion to stay.

Therefore, this Court finds Plaintiffs' argument of untimeliness without merit and concludes that Defendants' instant Motion is timely.

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[33] Indeed, this Court's finding that the dispute at hand is not subject to arbitration does not indicate that the dispute cannot be dismissed on the grounds of forum non conveniens, same as no forum non conveniens dismissal renders a dispute necessarily arbitrable.

B. CHAPTER 15 and COMITY-BASED CLAIMS

Another group of Plaintiffs' arguments asserts that Defendants' Motion should be denied in view of: (1) "Chapter 15," that is, 11 U.S.C. § 1501, et seq. and, specifically, § 1509, which "facilitates the efforts of foreign bankruptcy trustees to pursue claims in U.S. Courts" and "encourage[s] comity between U.S. and foreign court"; (2) 28 U.S.C. § 1782; and (3) "[t]he significant fact that a Dutch court overseeing the bankruptcy [proceedings of KPNQwest] *expressly* authorized [Plaintiffs] to bring their claims in the U.S.," and this "Dutch bankruptcy court's decision is entitled to comity and deference." Opposition at 21-22, 28 (internal quotations omitted, emphasis in original).

Plaintiffs' reasons for so claiming are not immediately obvious to this Court. Fashioned after UNCITRAL's Model Law on Cross-Border Insolvency, Chapter 15 generally applies whenever there is a foreign insolvency proceeding relating to a *debtor* that is subject to a bankruptcy case of some kind in the United States; the reach of the provision is limited to the matters related to *insolvency* proceedings, see 11 U.S.C. § 1501(a) ("The purpose of this chapter is to . . . provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of . . . fair and efficient administration of cross-border insolvencies"), and have *no* relevance whatsoever to actions brought under securities, agency or tort law.

Moreover, the "comity" implications of Chapter 15 have no relevance to the case at bar. Because of the enactment of Chapter 15, "[o]nce a foreign bankruptcy proceeding is recognized, a wide range of relief available under American bankruptcy law immediately becomes applicable, including the automatic stay provision in [S]ection 362 of the [Bankruptcy] Code." United States v. J.A. Jones Constr. Group, LLC, 333 B.R. 637, 638 E.D.N.Y. 2005). The availability of this wide range of relief is effectively a codification of previously existing international "comity" in the area of insolvency proceedings. See Jay Lawrence Westbrook, Chapter 15 at Last, 79 Am. Bankr. L.J. 713, 719 (2005). Since the action at bar is not a bankruptcy proceeding brought in another forum and seeking a stay (or any other related relief) in the United States, this Court finds Plaintiffs' Chapter 15 argument inapposite to the issue of forum non conveniens.

Plaintiffs' decision to rely on 28 U.S.C. § 1782 and on the related statutory interpretation provided in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), see Opposition at 22, is equally puzzling, since both the provision and the Supreme Court's clarification of the statute *undercut* Plaintiffs' opposition to Defendants' instant Motion. In Intel, respondent filed an antitrust complaint against petitioner, a competitor of respondent, with a foreign investigative commission and sought a federal court order under § 1782 requiring petitioner to produce potentially relevant documents. Petitioner, however, contended that § 1782 did not

permit respondent to seek discovery for use in the foreign proceedings, since: (1) respondent was a complainant rather than a party in the proceedings, (2) the proceedings were administrative rather than judicial, (3) the foreign commission's investigation was not a pending proceeding, and (4) there was no showing that the material sought by respondent would be discoverable under foreign law. The United States Supreme Court held that § 1782 provided the district court with authority to entertain respondent's discovery request while noting that, under the statute, the district court was authorized but not required to compel the discovery (since comity and parity concerns could inform the district court's broad discretion). See Intel Corp., 542 U.S. 241. In sum, the holding of Intel, (as does the language of § 1782) stands to assure that Plaintiffs are likely to have ample access to any evidentiary matters Plaintiffs might need if Plaintiffs are to commence this action in the Netherlands, and Plaintiffs' private interests are unlikely to be negatively affected by this Court's dismissal of this action on the grounds of forum non conveniens.

Finally, Plaintiffs' assertion that this Court should, out of "comity," deny Defendants' Motion because "a Dutch court overseeing the bankruptcy [proceedings of KPNQwest] expressly authorized [Plaintiffs] to bring their claims in the U.S.," Opposition at 28, is similarly bewildering.

Like the concept of public policy in the conflict of laws, the label "comity" can serve as a substitute

for analysis. See Paulsen and Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 1016 (1956). The comity principle was originally developed to explain how a sovereign state, absolutely powerful within its own territory, could give recognition or effect to another nation's *laws* without diminishing or denying its own sovereignty.[34] A legal doctrine, international comity

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[34] The use of the term "comity" to describe a theory for accommodating conflicting legal policies of territorial sovereigns was developed by scholars in 17th-century Holland to resolve conflicts between the laws of the various Dutch provinces. See Davies, The Influence of Huber's de Conflictu Legum or English Private International Law, 18 Brit. Y.B. Int'l L. 49, 52 (1937). The Dutch scholar, Ulrich Huber, set out to reconcile the fact and theory of national territorial authority with the needs of a developing international system in which persons and commerce moved across state lines. Huber summarized his analysis in three now well-known axioms: (1) the laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond; (2) those are held to be subject to a sovereign authority who are found within its boundaries, whether "they be there permanently or temporarily; (3) those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of

(continued...)

is not a rule of public international law, but the term characterizes many of those same functional elements that define a system of international legal order, it is a judicial tradition based on respect for sovereignty, a discretionary power of the court to *decline* jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against U.S. international convenience and duties, and against consideration for the rights of nationals and others under protection of its law.[35] See Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 129 (E.D.N.Y. 2000) (citing Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. Of Iowa, 482 U.S. 522, 555 (1987; Cunard S.S. v. Salen Reefer Serv. AB, 773 F.2d 452, 457 (2d Cir. 1985); Laker Airways Ltd. v. Sabena Belgian World

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(continued)

another state and another state's courts. See Davies, The Influence of Huber's de Conflictu Legum on English Private International Law, 18 Brit. Y.B. Int'l L. 26 (1937).

[35] In addition, the doctrine is also one of local restraint, limiting the application of sovereign power to extraterritorial events and persons. This second manifestation represents the role played by the doctrine in transnational regulatory cases. See M. Wolfe, Private International Law 19-20 (2d ed. 1950); Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9 (1966) ; Lorenzen, Huber's de Conflictu Legum, 13 Ill. L. Rev. 375, 375-77 (1918).

Airlines, 731 F.2d 909, 956 (D.C. Cir. 1984)). Thus, in Anglo-American law, the extension of comity to another nation is viewed as a unilateral decision of the forum, not as an act required by a rule of the public international system. See Energy Antimonopoly Act of 1979 (Part 1): Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 779 (1979) (statement of Monroe Leigh); see also Lorenzen, Story's Commentaries on the Conflict-of-Laws -- One Hundred Years Later, 48 Harv. L. Rev. 15, 35-36 (1934); Nussbaum, Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws, 42 Colum. L. Rev. 191 (1942).

This emphasis on the voluntary nature of the doctrine has led to its use to describe an amorphous "never-never" land whose borders are marked by fuzzy lines of politics, courtesy, and good faith. See Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971). The Somportex court observed that "[c]omity . . . is not a rule of law, but one of practice, convenience, and expediency," id. at 441, and it could be relevant *only* to such matters as legislative acts, executive orders or *disopositive judicial rulings*. See id. No "authorization" to sue in the foreign forum is subject to the discretionary considerations of the comity doctrine, and such authorization certainly cannot be read as a mandate to deny Defendants' Motion. See id. Moreover, the doctrine of comity would prevent the Dutch court from any direct or implied entry of opinion as to how this Court should apply the laws of this nation. Finally, this Court is aware of no provision in the Federal Rules of Civil Procedure – and Plaintiffs

enlighten this Court of none – which requires a foreign plaintiff having proper standing and invoking a proper jurisdictional basis to have an "authorization" from the plaintiffs national court in order to either initiate or maintain an action in the United States.

Consequently, this Court finds Plaintiffs' arguments based on Chapter 15 and the concept of comity without merit and irrelevant to this Court's balance of private and public interest factors.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss Plaintiffs' Complaint on the grounds of forum non conveniens will be granted with respect to Defendants Qwest Communications International, Inc., John A. McMaster, Robert S. Woodruff and Joseph P. Nacchio. Plaintiffs' claims against Defendants 1-10 will be dismissed for lack of prosecution. Defendants' Motion to Compel Plaintiffs to Post a Security Bond, Docket Entry No. 77, will be denied as moot. Defendants' Motion to Compel and to Extend Deadline for Completion of Document Discovery, Docket Entry No. 73, will be denied as moot, and the order that there shall be oral argument as to whether to compel and to extend deadline for completion of document discovery, Docket Entry No. 87, will be vacated as moot.

An appropriate order accompanies this opinion.

GARRET E. BROWN, JR.,
Chief Judge
United States District Court

Dated:

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 04-CV-3026 (JCL)

J.C. VAN APELDOORN and E.T. MEIJER,
IN THEIR CAPACITY AS TRUSTEES
IN BANKRUPTCY FOR KPNQwest
N.V., et al,

Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL,
INC.;
JOHN A. MCMASTER; JOSEPH P. NACCHIO;
ROBERT S. WOODRUFF and DEFENDANTS 1-10,

Defendants.

I, Daniel W. Wolff, declare and state as follows:

1. I am an attorney with the law firm of Crowell & Moring LLP and one of the attorneys representing the trustees in bankruptcy ("Trustees") of KPNQwest N.V. and certain wholly owned subsidiaries ("collectively, "KPNQwest"), the

plaintiffs in this case.

2. Through my involvement in the factual investigation in this case, I am familiar with the names of various current or former employees of KPNQwest, Qwest, and certain third-party business entities who appear likely to have information relevant to this case, including the individuals named below in Paragraphs 3 – 6, and the roles they appear to have played in the events giving rise to the allegations in the Trustees' complaint.

3. I am also familiar with efforts taken to locate such individuals. These efforts have given rise to information and belief that many potential witnesses in this case currently reside in the United States.

4. In particular, I have become familiar with the names of certain individuals who appear to have been instrumental in conceiving of, structuring, managing, approving, orchestrating, supervising, advising KPNQwest on, or participating in business activities involving or affecting KPNQwest – including (but not limited to) indefeasible rights of use agreements (*i.e.*, IRUs) and capital expenditures – that, according to the allegations in the Trustees' complaint, caused or contributed to the alleged injury to KPNQwest. Those individuals include:

a) Greg Casey, Executive Vice President of Wholesale Markets at Qwest. upon information and belief, Mr. Casey currently resides in Texas.

b) Susan Chase, VP of Wholesale Markets at Qwest. On information and belief, Ms. Chase currently resides in Colorado.

c) Dennis de Vreede (several executive positions at KPNQwest), Controller and VP of Finance. On information and belief, Mr. de Vreede currently resides in Ohio.

d) Bill Eveleth, Senior VP of Finance at Qwest. On information and belief, Mr. Eveleth currently resides in Colorado.

e) Brendan Keating (a former Qwest executive), Senior VP of Finance at KPNQwest. On information and belief, Mr. Keating currently works in Virginia and resides in the Washington, D.C. metropolitan area.

f) James Kozlowski, Director of Financing Reporting at Qwest (and also worked at KPNQwest). On information and belief, Mr. Kozlowski currently resides in Colorado.

g) Afshin Mohebbi, President of Qwest. Upon information and belief, Mr. Mohebbi currently resides in California.

h) Frank Noyes, Senior Manager of Financing Reporting at Qwest. On information and belief, Mr. Noyes currently resides in Arizona.

i) Robin Szeliga, Chief Financial Officer at Qwest. On information and belief, Ms. Szeliga currently resides in Colorado.

j) Jeff von Deylen, former Qwest executive and Chief Financial Officer at KPNQwest. On information and belief, Mr. von Deylen currently resides in Missouri.

k) Rhett Williams, Chief Marketing Officer at KPNQwest. On information and belief, Mr. Williams currently resides in Georgia.

5. I have also become familiar with the names of certain individuals who appear to have served on the KPNQwest Supervisory Board, including Qwest-appointed and independent members of the Supervisory Board. Those individuals include:

a) Scott Berman, Senior VP and Treasurer at Qwest, and a Qwest-appointed KPNQwest Supervisory Board member. On information and belief, Mr. Berman currently resides in Colorado.

b) Pierre Everaert, an independent KPNQwest Supervisory Board member. On information and belief, Mr. Everaert currently resides in New Jersey.

c) Richard Liebhaber, an independent KPNQwest Supervisory Board member. On information and belief, Mr. Everaert currently resides in Colorado.

d) Drake Tempest, General Counsel and Executive VP at Qwest, and a Qwest-appointed KPNQwest Supervisory Board member. On information and belief, Mr. Tempest currently resides in New York.

e) Marc Weisberg, Qwest-appointed KPNQwest Supervisory Board member. On information and belief, Mr. Weisberg currently resides in Minnesota.

6. I have also become familiar with the names of certain individuals who appear to have provided outside accounting advice to KPNQwest in connection with matters addressed in the complaint. Those individuals include Mark Iwan, partner and audit practice head at the Denver office of Arthur Andersen. On information and belief, Mr. Iwan currently resides in Colorado.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

_____

Daniel W. Wolff

Dated: April 17, 2006

APPENDIX F

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

APPENDIX G

Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the Untied States of America

Article V

Nederlandse versie

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1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. (a) Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party.

(b) In conformity with subparagraphs (1) and (2) hereof, awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party.

(1) As regards recognition and enforcement in the Untied States of America, such awards shall be entitled in any court in any State thereof only to the same measure of recognition and enforcement as awards rendered in other States thereof.

(2) As regards enforcement in the Kingdom of the Netherlands, such awards shall be dealt with in the same way as awards as referred to in the Convention on the execution of foreign arbitral awards concluded at Geneva on September 26, 1927.

APPENDIX H

Title 11 of the United States Code, Chapter 15

§ 1501. Purpose and scope of application

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(b) This chapter applies where—

(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

(2) assistance is sought in a foreign country in connection with a case under this title;

(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to—

(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109 (b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109 (e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of

this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

§ 1504. Commencement of ancillary case

A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

§ 1509. Right of direct access

(a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.

(b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter—

(1) the foreign representative has the capacity to sue and be sued in a court in the United States;

(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

(3) a court in the United States shall grant comity or cooperation to the foreign representative.

(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

(e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

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No. 08-439

Supreme Court, U.S.
FILED
DEC 2 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; ROBERT S. WOODRUFF; JOSEPH P. NACCHIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether, given this Court's repeated emphasis that the *forum non conveniens* analysis requires "flexibility" and that "each case turns on its facts," *certiorari* should be granted to review the decision below, which does not conflict with the decisions of other circuits, all of which properly recognize that the *forum non conveniens* analysis is sufficiently flexible to take into account *both* local *and* national considerations when appropriate on the facts of a given case?

RULE 29.6 STATEMENT

Qwest Communications International Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

The Third Circuit's decision below does not conflict with the decision of any other circuit or with any case decided by this Court. Rather, it presents an unremarkable application of settled *forum non conveniens* law in the context of a Dutch-centered dispute involving parties embroiled in related proceedings in the Netherlands. There is no tension between the Third Circuit's decision and U.S. treaty obligations, which Petitioners did not raise in the district court, and which would not have produced a different outcome if they had.

Factual and Procedural Background

Petitioners are the Dutch representatives of the estate of KPNQwest N.V. ("KPNQwest"), a Dutch telecommunications company headquartered in the Netherlands that did business throughout Europe. KPNQwest was created in 1999 through a joint venture between subsidiaries of Respondent Qwest Communications International Inc. ("Qwest") and Koninklijke KPN N.V. ("KPN"). KPN, which was partly owned by the Dutch government, provided KPNQwest with its infrastructure and numerous employees.

Originally, KPNQwest's Supervisory Board seats were split evenly between nominees from KPN and Qwest. KPN nominated Dutch employees of KPN or its subsidiaries; Qwest's initial nominees were Respondent Nacchio and two other Qwest employees. KPNQwest's board named Respondent McMaster the company's CEO, and he moved to the Netherlands to accept the position.

In 2002, a European telecommunications market crash forced KPNQwest to file for bankruptcy protection in the Netherlands.

Two years later, Petitioners sued Colorado-based Qwest; Woodruff, a Coloradan who served on KPNQwest's Supervisory Board; Nacchio, a New Jersey resident who served on KPNQwest's Supervisory Board; and McMaster, now a New Jersey resident who was KPNQwest's CEO. Although they are Dutch and have neither professional nor personal contacts with the United States or New Jersey, Petitioners filed suit in the District of New Jersey. They asserted two types of claims: (1) Dutch law claims for mismanagement and breach of fiduciary duty under eleven Dutch Civil Code sections, and (2) a RICO claim, alleging that defendants induced KPNQwest to use misleading accounting methods to inflate the prices of Qwest and KPNQwest stock and to sell Qwest stock at inflated prices.[1] *See* Pet. App. at 4a-5a, 70a-71a.

Respondents timely moved to dismiss on *forum non conveniens* grounds, arguing that this Dutch-centered lawsuit belonged in the Netherlands, which, by contrast with Petitioners' chosen forum, has substantial contacts with, and interest in, the parties' dispute. *Id.* at 43a-46a. In addition to the lion's share of the witnesses and documents, the Netherlands was

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[1] Petitioners' RICO claim, their sole American law claim, is barred under the PSLRA's RICO bar. *See* note 9, *infra*. The issue was briefed, but not reached, below; the lower courts found that this case belonged in the Netherlands even assuming a viable RICO claim.

also home to related proceedings involving all parties to this action and many other entities, including:

- An action brought by Dutch KPNQwest shareholders in the Enterprise Chamber, a branch of the Civil Court in Amsterdam with jurisdiction over corporate mismanagement claims. All parties to this case, plus KPN, KPN's nominees to KPNQwest's board, and others are involved in this proceeding. *See id.* at 44a-45a.

- A "significantly related" lawsuit filed by KPNQwest lenders against Qwest, Nacchio, McMaster, KPN, and others, that "involve[s] some of the same issues as this litigation." *Id.* at 30a.

- Insurance litigation that "names all of the individuals in this lawsuit and contains many of the same issues raised in this litigation." *Id.* at 31a.

And Respondents' "pursuit of contribution claims would result in additional, related litigation in the Netherlands." Pet App. at 25a.

The district court dismissed. After finding the Netherlands an adequate forum (which was not contested), the district court considered how much deference to accord Petitioners' forum choice. Because Petitioners are foreign, the district court conducted a convenience analysis to determine the level of deference. Although Petitioners did not brief the issue, the district court independently searched the record for evidence of convenience. Finding little, it accorded

Petitioners' forum choice a "low degree of deference." *Id.* at 56a-61a.

The district court then analyzed the public and private interest factors. It found that the public interest factors "heavily favor[]" dismissal because: (i) neither New Jersey nor the United States had a strong interest in this case alleging fraud against, and mismanagement of, a Dutch company by its own board members, CEO, and stockholder; (ii) U.S. courts and New Jersey jurors would be unnecessarily burdened by a case with no connection to or impact on New Jersey; and (iii) the Netherlands had a strong interest. Pet. App. at 67a-72a. The district court found that the balance of the private interest factors also "unambiguously" favors dismissal primarily because concentrating all related litigation in the Netherlands promised to maximize witness convenience and judicial economy. *Id.* at 78a-81a.

Finally, the district court concluded that litigating these Dutch-centered claims in New Jersey rather than in Petitioners' home forum would be "oppressive or vexatious" considering: (1) the related Dutch proceedings involved the parties and many relevant third-parties; (2) certain third-parties could be sued for contribution only in the Netherlands; (3) maintaining actions in two different countries would increase unnecessarily the burdens of the litigation; and (4) maintaining litigation in the U.S. would require translation of documents and testimony in Dutch. *Id.* at 80a-84a.

In opposing the motion to dismiss in the district court, Petitioners did not brief or argue the following issues discussed in their Petition: (1) their claim on

appeal that they chose to file in New Jersey for reasons of convenience; (2) that any treaty affected the *forum non conveniens* analysis in any way; and (3) that transfer pursuant to 28 U.S.C. § 1404(a) should be considered as an alternative to dismissal.

Petitioners appealed the dismissal to the Third Circuit, which affirmed, holding that:

> the District Court did not abuse its discretion in according the Trustees' forum choice a low degree of deference, that the District Court did not abuse its discretion in balancing the public and private interest factors, and that the District Court did not abuse its discretion in determining that continuing with this lawsuit in New Jersey would be oppressive or vexatious to the Defendants out of all proportion to the convenience of the Trustees.

Id. at 32a.[2] The Third Circuit denied Petitioners' petition for rehearing. Pet. App. at 36a.

REASONS FOR DENYING THE WRIT

The Petition is premised on the assertion that the Third Circuit decision below conflicts with certain decisions of other circuits and this Court. That

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[2] Because it affirmed dismissal of the case, the Third Circuit dismissed as moot Respondents' contingent cross-appeal of the district court's denial of a motion to compel arbitration. Pet. App. at 32a. To preserve that issue, Respondents filed a conditional Cross-Petition for Writ of Certiorari, which has been docketed in this Court as No. 08-614.

supposed conflict rests entirely on a mischaracterization of the relevant cases.

The Third Circuit held that the *forum non conveniens* analysis is sufficiently flexible to permit courts to consider *both* national *and* local factors as appropriate on the facts of a particular case. Petitioners contend that conflicting caselaw holds that courts must look *exclusively* at national factors, and may not consider local ones.

But two of the three cases that Petitioners claim conflict with the decision below — *Esfeld v. Costa Crociere S.P.A.*, 289 F.3d 1300 (11th Cir. 2002), and *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991) — are inapposite. Neither decision even considered whether the *forum non conveniens* analysis is sufficiently flexible to take into account both local and national factors, much less decided it is not. In other cases, the Eleventh and Eighth Circuits have made clear that they consider both national and local factors.

Petitioners' interpretation of the third case on which they rely — *Mercier v. Sheraton Int'l, Inc. ("Mercier II")*, 935 F.2d 419 (1st Cir. 1991) — was expressly rejected by the First Circuit itself in a subsequent opinion in the same case that Petitioners have inexplicably failed to cite. In that later opinion, the First Circuit enunciated precisely the same standard as that applied by the Third Circuit below.

Thus, there is no circuit split. Nor is there any conflict between the analysis applied below and any decision of this Court, which has repeatedly emphasized that the *forum non conveniens* analysis

requires "flexibility" and that "each case turns on its facts." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (quotation and citation omitted).

Finally, the issue that Petitioners present does not merit review because the Third Circuit's decision was correct and would not change even if the analysis did not consider the absence of local New Jersey interest in this case. And there is no public policy reason for this Court to review the lower court's fact-bound decision or to address issues and arguments that were not presented to the district court in the first instance.

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY CASE DECIDED BY THIS COURT OR ANY OTHER COURT OF APPEAL.

Despite Petitioners' contentions, there is no conflict among the courts of appeal and no conflict between the decision below and decisions of this Court.

Petitioners' claim of circuit conflict rests on a mischaracterization of both the Third Circuit's decision and decisions from other courts of appeal that supposedly conflict with it. It also ignores more pertinent authority from those same circuits endorsing precisely the analysis employed below. And nothing in that analysis conflicts with any holding of this Court.

A. The supposed conflict is premised on a mischaracterization of the Third Circuit's holding.

Federal *forum non conveniens* analysis requires courts to compare (1) the convenience of litigating in a

foreign country with (2) the convenience of litigating here. Petitioners incorrectly contend that the Third Circuit held that the inquiry should "focus on the convenience of proceeding in New Jersey," and "ignored the Trustees' showing of convenience in the United States." Pet. at 10.

The Third Circuit did not "ignore" the potential convenience of proceeding in the United States. Rather, it held that the district court did not abuse its discretion when, on the facts of this case, it considered *both* this case's tenuous relationship to New Jersey *and* its equally tenuous relationship to the United States as a whole: "Although the relationship between the United States and a case generally should be considered, this does not mean that the relationship between the local federal court district and the case should not." Pet. App. at 16a.

Petitioners also fail to acknowledge that the Third Circuit considered not only this case's lack of connections to New Jersey, but also its lack of connections to the United States as a whole. Specifically, the Third Circuit approved the district court's conclusion that the tangential connections of this Dutch-centered dispute to the United States "'cannot transform the case into an "American" dispute.'"[3] *Id.* at 19a. It also expressly weighed (1)

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[3] The district court likewise emphasized that this case has no substantial relationship with *either* New Jersey *or* the United States as a whole. *See, e.g.*, Pet. App. at 57a ("Plaintiffs, Dutch attorneys appointed by a Dutch court to act as bankruptcy trustees for a Netherlands-based entity, are indeed foreign plaintiffs that have neither personal or business contacts with the United States or the State of New Jersey"); *id.* at 67a ("The fact

other lawsuits filed in other U.S. forums and (2) the national interest of the United States in redressing the allegedly wrongful conduct of an American corporation and American executives. *Id.* at 22a, 31a. But it found all of those factors outweighed by, among other things, the far stronger interest of the Netherlands[4] and the oppression and vexation inherent in forcing defendants to litigate related proceedings simultaneously in both forums. *See, e.g., id.* at 15a, 20a, 25a, 27a-29a.[5]

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that two of these defendants are domiciled in the state of New Jersey does not transform the case into a 'local dispute,' same as the facts that four Board meetings took place somewhere in the United States and Defendants, while being present in the United States, took part in five international conference calls, cannot transform the case into an 'American' dispute."); *id.* at 68a ("the United States and the community of the District of New Jersey have little interest in the resolution of this case").

[4] Significantly, in its *amicus* brief the Kingdom of the Netherlands does not assert either that the lower courts incorrectly assessed its "substantial" interest in this case or even that this case belongs in the United States; the Kingdom focuses instead solely on a treaty that Petitioners did not rely on below and that, as explained below, would not change the result in any event.

[5] Petitioners also incorrectly assert that the Third Circuit "held that it could not make a determination as respects the United States as a whole" and that, therefore, "it remains for the Trustees to re-file elsewhere and test *forum non conveniens* issues anew in that other district." Pet. at 16. Rather, in rejecting Petitioners' position that *any* consideration of local conditions is forbidden, the Third Circuit recognized, in dictum, that local considerations might, in an appropriate case, weigh heavily in the analysis. Pet. App. at 16a. But, contrary to Petitioners' argument, the court did

B. The supposed conflict is premised on a mischaracterization of the law in other circuits.

Petitioners purport to find a circuit split by comparing their misreading of the Third Circuit's holding with what they contend are conflicting holdings of the First, Eighth, and Eleventh Circuits. According to Petitioners, each of those courts has held that the "the forum comparison should be *exclusively*

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not conclude that this was such a case. Instead, it emphasized only that the scope of the preclusive effect to be accorded its decision was not before it. *Id.* ("Thus, the conclusion we reach in this case does not *necessarily* mean that this action may not be maintainable in another federal district.") (emphasis added).

Nor is that issue before this Court. If Petitioners were to re-file this suit in another district, ordinary preclusion principles would compel a prompt dismissal, in view of the findings below that there is no significant *American* interest in this lawsuit and that related proceedings in the Netherlands, which has a strong interest in this case, renders simultaneous trans-Atlantic litigation oppressive and vexatious. Successive filings have been dealt with in precisely that way for decades without causing any of the problems that Petitioners warn against. *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1498 (5th Cir. 1993) ("a plaintiff may not relitigate a *forum non conveniens* issue [already decided in another district court] unless he can show some objective facts that materially alter the considerations underlying the previous resolution") (quotation and citation omitted), *abrogated on other grounds by Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 853 (3d Cir. 1977) (holding that a *forum non conveniens* determination in New York federal district court precluded relitigation of the issue in a Delaware federal district court where the Second Circuit had concluded that England was the most appropriate forum).

between the United States and the foreign country." Pet. at 29-30 (emphasis in original).

Petitioners' statement of the holdings of those courts is flatly wrong. None of those courts — nor any other — has so held.

The Eleventh and Eighth Circuit cases on which Petitioners rely — *Esfeld*, 289 F.3d 1300 and *Reid-Walen*, 933 F.2d 1390 — are inapposite and do not conflict with the decision below. Neither even purported to decide whether the flexible *forum non conveniens* analysis permits consideration of *both* local and national factors; the out-of-context snippets on which Petitioners rely are dictum stated in the course of resolving the very different questions before those courts.

In *Esfeld*, the Eleventh Circuit decided whether, in a diversity case, the *forum non conveniens* analysis was governed by state or federal law. 289 F.3d at 1306. *Esfeld* did not hold, as Petitioners claim, that "the forum comparison should be *exclusively* between the United States and the foreign country." Pet. at 29-30 (emphasis in original). That issue was not before the Eleventh Circuit in that case. But later cases confirm that, like the Third Circuit, the Eleventh Circuit considers *both* local and national factors in the *forum non conveniens* analysis. *See, e.g., Paolicelli v. Ford Motor Co.*, No. 06-13688, 2008 WL 3855042, at *3 (11th Cir. Aug. 20, 2008) (slip copy) ("juries in the three countries as opposed to jurors that live in the Southern District of Florida, have a greater interest in and connection to the accidents."); *Ford v. Brown*, 319 F.3d 1302, 1309-10 (11th Cir. 2003) (although relevant evidence was located in Texas, Florida was an

inconvenient forum because, *inter alia*, "most of the evidence in this litigation is in Hong Kong, while some witnesses are in England and others are in Texas. Florida is relevant only because one alleged Exxon employee, defendant Brown, happened to live in Florida at the time Plaintiff took a notion to sue. Of all possible forums, Florida is unquestionably the worst.").

Reid-Walen is similarly inapposite, since the Eighth Circuit likewise did not even consider whether "the forum comparison should be *exclusively* between the United States and the foreign country," Pet. at 29-30 (emphasis in original), much less hold that it should. Rather, the out-of-context language on which Petitioners rely relates to the court's holding, which is inapplicable here, that a U.S.-resident, American citizen suing in a federal district in which she does not reside is nonetheless entitled to the deference due a plaintiff suing in her home forum. *Reid-Walen*, 933 F.2d at 1394 ("the 'home forum' for the [U.S.-resident] plaintiff is any federal district in the United States, not the particular district where the plaintiff lives."). Like the Third Circuit, the Eighth Circuit also considers both national and local interests in the *forum non conveniens* analysis when appropriate on the facts of a particular case. *See, e.g., De Melo v. Lederle Labs.*, 801 F.2d 1058, 1063 (8th Cir. 1986) ("The only states that have any material connection to this litigation are New York and New Jersey. There simply is no justification for adding to the local docket in Minnesota or imposing jury duty on Minnesota residents on a matter which affects the forum and its residents in such a minimal fashion.").

As for *Mercier v. Sheraton Int'l, Inc.* (*"Mercier II"*), 935 F.2d 419 (1st Cir. 1991), the Petitioners

inexplicably failed to acknowledge a subsequent opinion in that same case in which the First Circuit expressly rejected the reading of *Mercier II* on which Petitioners have premised their claimed conflict:

> *Mercier II* did not state that a district court could not recognize, as a factor to be considered in its forum non conveniens analysis, the attenuated connection between the matter in litigation and the *particular forum* selected within the United States. Rather, we pointed out that the connection between the matter in litigation and the particular forum within the United States may not wholly *supplant* the dominant transnational comparison required where "the choice facing the district court [is] between two *countries*." Provided adequate recognition is accorded "the substantial public interest in providing a convenient United States forum for an action in which all parties are United States citizens and residents," the trial court may weigh, as a subsidiary consideration, any attenuated connection between the particular United States forum and the matter in litigation.

Mercier v. Sheraton Int'l, Inc. ("Mercier III"), 981 F.2d 1345, 1355 (1st Cir. 1992) (citations omitted, emphasis in original), *cert. denied,* 508 U.S. 912 (1993). Thus, contrary to what Petitioners contend, the First Circuit did *not* hold that "the forum comparison should be *exclusively* between the United States and the foreign country" Pet. at 29-30 (emphasis in original); instead, it expressly rejected that proposition.

Thus, the First, Eighth, and Eleventh Circuits do not hold that the *forum non conveniens* analysis must focus exclusively on national factors. To the contrary, they agree with the court below that in appropriate cases *both* local and national factors are relevant in the *forum non conveniens* analysis. Because these courts and the Third Circuit are in complete accord on this issue, there is no conflict among the courts of appeal[6]

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[6] Petitioners also cherry-pick language from Ninth and D.C. Circuit opinions that they contend obliquely support their position. Pet. at 32. Again, however, the cases cited do not conflict with the Third Circuit's holding. Rather, as the First Circuit recognized in *Mercier III*, both the Ninth and the D.C. Circuits espouse the same flexible approach as the First, Third, Eighth, and Eleventh Circuits. *Mercier III*, 981 F.2d at 1355 (collecting cases). Indeed, the courts of appeal regularly find the *forum non conveniens* analysis sufficiently flexible to take local considerations into account when the facts of a particular case warrant. *See, e.g., Van Schijndel v. Boeing Co.*, 263 Fed. Appx. 555, 557 (9th Cir. 2008) (holding that district court properly considered both the case's lack of connection to California and its lack of connection to the United States); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 799, 802 (5th Cir. 2007) (affirming and adopting as the opinion of the court of appeals the district court's opinion holding that, although the plaintiff was a U.S.-resident, American citizen, the "facts of this case have no connection with Texas"); *Rustal Trading US, Inc. v. Makki*, 17 Fed. Appx. 331, 338 (6th Cir. 2001) ("the relationship between the Eastern District of Michigan and the underlying dispute in this case is tenuous at best"); *Kamel v. Hill-Rom Co., Inc.* 108 F.3d 799, 804-05 (7th Cir. 1997) ("Here . . . we have a foreign plaintiff who was injured in a foreign land filing suit against an American defendant with extensive foreign dealings. The district court thus made a permissible inference that Indiana residents have a mere

and, thus, no reason for this Court to grant review here.

C. The decision below is consistent with this Court's *forum non conveniens* caselaw.

Petitioners also assert that this Court's decision in *Piper*, 454 U.S. 235, "reflect[s]" — not "holds" — that the *forum non conveniens* analysis should focus exclusively on the convenience of proceeding in the United States. Pet. at 14-15, 32. Here, too, Petitioners are incorrect. Petitioners' strained argument, Pet. at 32, that this Court's use of the adjectives "American" and "Scottish" — rather than "Pennsylvanian" and "Scottish" — was intended to convey that courts must consider *only* national interests, assigns undue weight to a word choice not material to any issue before this Court in that case.

Certainly, no court has found such a bright-line rule in *Piper* or in this Court's other *forum non conveniens* decisions. Such a rule would be inconsistent with this Court's emphasis on the need to retain "flexibility." *Piper*, 454 U.S. at 249. This Court has consistently eschewed *per se* rules, emphasizing instead that "each case turns on its facts." *Koster v.*

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passing interest in this case."); *Pain v. United Technologies Corp.*, 637 F.2d 775, 792 (D.C. Cir. 1980) (recognizing contacts with the United States but holding that: "[s]ince this controversy has no relation whatever to the forum chosen by the plaintiffs[,] the District of Columbia[,] the district judge was entirely justified in dismissing the case. . . . jury duty for this matter ought not be imposed upon the people of the District of Columbia, nor should local dockets be clogged by appeals in this case"), *abrogated on other grounds by Piper*, 454 U.S. 255.

(American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 528 (1947) (quotation omitted); *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (noting that "uniformity and predictability of outcome" is almost impossible in the *forum non conveniens* context because of the "multifariousness of the factors relevant to its application"). Moreover, this Court has emphasized "the local nature of the 'public factors' relevant to the *forum non conveniens* determination." *Am. Dredging*, 510 U.S. at 456 (citation omitted).

The Third Circuit's holding that it was appropriate for the district court to consider *both* the lack of New Jersey interest *and* the lack of any significant national interest in this lawsuit was based on its analysis of the particular facts of this case and is thus in harmony with the decisions of other circuits and fully consistent with this Court's *forum non conveniens* cases.

II. IN ANY EVENT, THE THIRD CIRCUIT'S RULING WAS CORRECT AND WOULD NOT CHANGE EVEN IF THE ANALYSIS FOCUSED EXCLUSIVELY ON THE CONNECTIONS BETWEEN THIS CASE AND THE UNITED STATES.

Just as there is no circuit split and no inconsistency with this Court's decisions that justify review, there are also no "compelling reasons" to grant the Petition. The greater deference the Petitioners seek for their choice of forum would not change the conclusion that this Dutch-centered case belongs alongside the related

proceedings in the Netherlands. That is further reason to deny the Petition.[7]

The Petition asserts, in essence, that the Third Circuit afforded Petitioners' forum choice too little deference when it held that "the District Court properly and thoroughly considered the particular circumstances presented by this litigation," and did not "abuse[] its discretion in determining that the balance of the public and private interest factors clearly favored dismissal." Pet. App. at 25a. Petitioners assert that they should have received the highest level of deference,[8] implicitly suggesting that greater deference would have led to a different result. This is wrong for at least two reasons.

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[7] *See, e.g.*, Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, and Edward A. Hartnett, *Supreme Court Practice* 248 (9th ed. 2007) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *cf. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals.").

[8] The basis for Petitioners' claim to greater deference is what they contend — without citation to the record other than to an affidavit showing that *some* witnesses were in the United States — was a showing that their decision to file this case in the United States was driven by convenience rather than forum-shopping. Pet. at 19-21. Petitioners do not cite to the record because they failed to brief the issue of convenience, or to make any record of the reasons for their forum choice, in the district court and thus made no such showing below.

First, the opinions below did not turn on considerations particular to New Jersey, but rather on considerations that apply with equal force to a nation-to-nation comparison. The "particular circumstances," *id.* at 14a, on which the district court and court of appeals focused included the following: (i) the Petitioners are Dutch residents acting on behalf of a Dutch corporation and are already immersed in Dutch bankruptcy proceedings involving the corporation, *id.* at 15a; (ii) the Netherlands has substantial associations with — and interest in — this case, including ongoing, related proceedings, *id.* at 20-21a; (iii) numerous witnesses and potentially responsible parties reside in the Netherlands, *id.* at 23a; (iv) proceeding in the Netherlands would permit defendants to pursue contribution claims against other potentially responsible foreign entities, *id.* at 25a; (v) Petitioners primarily assert claims under Dutch law,[9]

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[9] Indeed, given the practical nature of the *forum non conveniens* analysis, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), it is appropriate to note that the only claims potentially triable in this case are the alleged violations of Dutch statutes relevant to the internal operations of a Dutch corporation. Pet. App. at 21a. Although the lower courts assumed for purposes of their analysis the viability of Petitioners' RICO claim, that claim is barred by the PSLRA. *See* 18 U.S.C. § 1964(c); Pub. L. 104-67, § 107, 109 Stat. 737, 758 (1995) ("no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a [RICO violation]"). In the district court, Petitioners described their original complaint — which was amended but "asserted the same essential facts and claims as their original complaint," Pet. App. at 6a — in terms that leave no doubt that their claims were "actionable" as securities fraud and therefore could not support a RICO claim:

> In 125 detailed pages, the Complaint alleges . . . a massive financial fraud. The purpose of this fraud, insofar as it

id. at 21a; and (vi) any American interest in this case was only general and not compelling, *id.* at 22a. None of these factors turn upon whether the relevant forum is the United States as a whole or a particular state, and all demonstrate that, compared to the Netherlands, requiring defendants to litigate in any American forum would be inconvenient, oppressive, and vexatious. Petitioners' contrary assertion that the litigation was filed in the home state of two of the defendants, and hence must certainly be "convenient," Pet. at 19, was considered and rejected by both the district court and the Third Circuit based on their views of the facts of this case. Pet. App. at 15a, 25a, 72a, 81a. Petitioners' disagreement with those fact-bound, discretionary rulings does not merit review by this Court.[10]

> affected KPNQwest, was to artificially prop up the value of both Qwest and KPNQwest in order to ensure that Qwest's and KPNQwest's outrageously optimistic revenue projections could be concealed and *Qwest's and KPNQwest's inflated stock price preserved or enhanced.*

C.A. App. at JA-781 (emphasis added). Such facially defective American claims should not weigh in the *forum non conveniens* analysis. *See Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1032 (3d. Cir. 1980) ("[T]he mere presence of a count pleaded under [American law] but which may have little chance of success does not warrant . . . a conclusion [that *forum non conveniens* dismissal is inappropriate]. If we were to hold otherwise, the plaintiffs could avoid dismissal on forum non conveniens grounds by the inclusion of a substantive count based on American law regardless of the merits of that claim.")

[10] *Cf., e.g., Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003) ("Bearing in mind that litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home

Second, as a practical matter, the test applied by the Third Circuit required Respondents to make a showing of inconvenience sufficient to overcome the maximum level of deference required by this Court's *forum non conveniens* cases. In affirming the district court's finding that the "balance of the public and private interest factors clearly favored dismissal," *id.* at 25a, the Third Circuit emphasized that:

> Although the Trustees' choice of forum was accorded a low degree of deference, the Defendants must nevertheless demonstrate that a *forum non conveniens* dismissal is warranted.
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> * * *
>
> A defendant seeking dismissal on *forum non conveniens* grounds must show that the balance of the public and private factors "tips decidedly in favor of trial in the foreign forum." *Lacey v. Cessna Aircraft Co. ("Lacey II")*, 932 F.2d 170, 180 (3d Cir. 1991). "If, when added together, the relevant private and public interest factors are in equipoise, or even if they lean only slightly towards dismissal, the motion to dismiss must be denied." *Id.*

Id. at 17a-18a.

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forum over other fora where defendant is amenable to suit and to which the plaintiff and the circumstances of the case are much more closely connected suggests the possibility that plaintiff's choice was made for reasons of trial strategy.").

The "tips decidedly" standard of *Lacey II* applied below more than meets the standard this Court has articulated for cases involving foreign plaintiffs. In *Piper*, for example, this Court held that a finding that "trial in the plaintiff's chosen forum would be burdensome . . . is sufficient to support dismissal on grounds of *forum non conveniens*." 454 U.S. at 259.

In fact, the *Lacey II* standard is essentially the standard used by this Court and by other circuits in evaluating *forum non conveniens* challenges to lawsuits by American citizens residing in the U.S. *See, e.g., Piper*, 454 U.S. at 255 ("there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public factors *clearly point* towards trial in the alternative forum") (emphasis added); *Mercier II*, 935 F.2d at 423-24 (party moving for dismissal of U.S.-resident, American citizen's claims must establish "that considerations of convenience and judicial efficiency *strongly favor* litigating the claim in the second forum") (emphasis added).

A finding, as here, that the balance of the public and private interest factors "tipped decidedly toward trial in the Netherlands," Pet. App. at 18a, suffices to overcome even the deference owed a U.S.-resident, American plaintiff. As this Court observed in *Piper*:

> Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be

> unnecessarily burdensome for the defendant or the court, dismissal is proper.

454 U.S. at 255 n.23.

The lower courts' conclusions that the balance "tips decidedly" in favor of trial in the Netherlands turned on factors unaffected by whether the relevant comparison looks to New Jersey or to the United States as a whole. The determination that these Dutch plaintiffs — who made no effort to show their choice of forum was driven by convenience as opposed to more traditional forum-shopping — were entitled to less deference was neither erroneous nor the determining factor below. This Court should not grant review to consider a question that will have no bearing on the judgment below.

III. THERE IS NO POLICY REASON FOR THIS COURT TO GRANT REVIEW.

Although they stop short of a frontal attack on the *forum non conveniens* doctrine, Petitioners and their *amici*[11] assert that this Court should rein in the

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[11] Neither *amicus* brief complied with this Court's Rule 37, since, as the letters filed by the *amici* with the Clerk show, the individual Respondents were not asked for, and consequently did not grant, their consent to the filing.

Nor should this Court consider the amicus briefs to be evidence of broad interest in the question presented by the Petition for several reasons. First, Petitioners "made a monetary contribution" to INSOL Europe's brief. Br. of INSOL Europe at 1, n.1. Second, Rutger Schimmelpennink, a current member of INSOL Europe's board and its Immediate Past President, is Petitioners' law partner at the Houthoff Buruma firm, which also

doctrine to ensure that international plaintiffs are not discouraged from suing in our courts. This Court has previously rejected that speculative line of reasoning and should do so here as well.

Petitioners and their *amici* present no empirical evidence to support their professed concern. Nor can they. There is no reason to conclude that an occasional *forum non conveniens* dismissal — this case marks the first time that the Third Circuit has affirmed such a dismissal since 1980 — will call into doubt the continued truth of Lord Denning's observation that "[a]s a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs. Ltd. v. Bloch*, (1983) 1 W.L.R. 730, 733 (Eng. C.A.). And in *American Dredging*, this Court rejected the argument that such speculative concerns about the potential reactions of future litigants to the doctrine's application justified curtailing its flexibility:

> [T]o tell the truth, *forum non conveniens* cannot *really* be relied upon in making decisions about secondary conduct — in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application make

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represents Petitioners in the Netherlands, *see* INSOL-Europe Executive, Council & Secretariat, http://www.insol-europe.org/aboutus/executivecouncil.cfm (last visited Nov. 26, 2008); Houthoff Buruma, http://www.houthoff.com/index.php?id=122&suggest=kpnqwest&t=6 (last visited Nov. 26, 2008). And third, the Kingdom of the Netherlands expressed only a narrow — and, as explained below, misplaced — concern about a treaty that Petitioners did not raise in the district court.

> uniformity and predictability of outcome almost impossible. "The *forum non conveniens* determination," we have said, "is committed to the sound discretion of the trial court." . . . In such a regime, one can rarely count on the fact that jurisdiction will be declined.

510 U.S. at 455. (Emphasis in original; citations omitted).

This Court should likewise reject INSOL Europe's suggestion that this Court should reexamine *Piper*'s holding that a foreign plaintiff's forum choice warrants less *presumptive* deference than that of a U.S.-resident, American plaintiff.[12] The suggestion that the *forum non conveniens* doctrine poses a "virtually insuperable barrier to foreign plaintiffs in the United States," INSOL Br. at 11, cannot be squared with decades of experience suggesting that a dearth of foreign plaintiffs is not now, nor is likely to become, a significant problem for our courts.[13]

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[12] INSOL Europe insinuates that this aspect of the *Piper* holding merits reconsideration because it only "represent[s] the plurality view of four Justices." INSOL Br. at 11. But the *majority* opinion in *Piper* was just that, a majority opinion — and one which this Court unanimously cited with approval just last Term. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S.Ct. 1184, 1191 (2007) ("When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" (*quoting Piper Aircraft Co.*, 454 U. S. at 255-56).

[13] *Cf., e.g., Morrison v. Nat'l Australia Bank Ltd.*, __ F.3d. __, No. 07-0583-cv, 2008 WL 4660472, at * 4 (2nd Cir. Oct. 23, 2008) ("Here, a set of (1) *foreign* plaintiffs is suing (2) a *foreign* issuer in

Neither Chapter 15 of the Bankruptcy Code nor the Treaty of Friendship, Commerce, and Navigation between the United States and the Netherlands (the "FCN Treaty") undercuts the Third Circuit's decision or otherwise necessitates review.

It is somewhat unclear whether Petitioners claim that Chapter 15 somehow applies to this case or only that it suggests public policy concerns that should alter the normal workings of the *forum non conveniens* doctrine. Either position would be wrong. First, Chapter 15 does not apply to this case because Petitioners never commenced an ancillary case under the chapter as required under 11 U.S.C. §§ 1504, 1509(a).[14] Second, Petitioners cite no cases, statutory text or legislative history supporting their position that the amendments to Chapter 15 should be read to alter the application of the *forum non conveniens* doctrine. Nor can they; Chapter 15 and the cases and commentary interpreting it establish that Congress intended only to facilitate cross-border insolvencies. Pet. App. at 91a-97a. This case does not implicate that Congressional concern, particularly because, in view of

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an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries."). (Emphasis in original).

[14] Chapter 15 does not apply in any event. This case was filed in June 2004, Pet. at 5, more than a year before the Act's effective date. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 § 1501, 119 Stat. 23, 216 (2005) ("this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act"; "the amendments made by this Act shall not apply with respect to cases commenced under Title 11, United States Code, before the effective date of this Act").

the lower courts' uncontested finding that the Netherlands is an adequate alternative forum, *id.* at 11a n.3, there is no need for the sort of "assistance" from American courts that Chapter 15 contemplates. Finally, Chapter 15 itself expressly rejects the notion that it displaces or modifies generally applicable *forum non conveniens* law. *See* 11 U.S.C. § 1509(e) ("a foreign representative is subject to applicable nonbankruptcy law").

The FCN Treaty between the United States and the Netherlands similarly provides no reason for this Court to grant review. Petitioners misstate, and their *amici* therefore misunderstand, the state of the record on this issue. Contrary to Petitioners' assertion, Pet. at 8, the district court did not "hold" that there was no FCN treaty; it merely stated that it was "aware of no [FCN treaty]." Pet. App. at 57a n.14. That is because Petitioners did not raise the issue in the district court. *Id.* ("Plaintiffs similarly do not assert that, under any [FCN] treaty, Plaintiffs qualify for 'national access'"). Petitioners now assert that a copy of the treaty is "in the record of this case," implying either that the district court misread the record or that Petitioners *did* raise the issue. Pet. at 8. Neither implication is correct. Petitioners submitted the copy of the treaty "in the record of this case" in connection with a later-filed motion, which the district court never reached because the *forum non conveniens* dismissal mooted it. *See* Pet. App. at 97a ("Defendants' Motion to Compel Plaintiffs to Post a Security Bond, Docket Entry 77, will be denied as moot"). This case is therefore not an appropriate vehicle to address the issue.

Even if the issue had been properly raised below, however, it would not be a reason to grant review.

Petitioners and their *amici* correctly assert that the FCN Treaty guarantees Dutch citizens the same treatment as American citizens in the *forum non conveniens* analysis. But they err in assuming that all American citizens — regardless of where they reside — automatically receive the highest level of deference as to their forum choice. In fact, as the Second Circuit has explained, there is no merit to Petitioners' "assertion that [an FCN] treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship." *Pollux Holding*, 329 F.3d at 73.

The forum choice of expatriate Americans — and non-resident foreigners enjoying "national access" treaty rights — has long been accorded less *presumptive* deference than that of U.S.-resident American citizens. *See, e.g., id.* ("[Plaintiffs claiming 'national access' treaty rights] cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, *at best*, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum.") (emphasis added); *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 n.5 (2d Cir. 2001) (*en banc*) ("When [an earlier Second Circuit opinion] spoke of the deference due to the choice of forum by U.S. 'citizens,' we understand those references to signify citizens who were also U.S. residents, rather than situations in which an expatriate U.S. citizen residing permanently in a foreign country brings suit in the United States. As to such suits, it would be less reasonable to assume the choice of forum is based on convenience.") (citation

omitted)[15]; *Pain*, 637 F.2d at 797 ("the factor of American citizenship per se proves largely irrelevant to the factors which [the Supreme Court] required courts to consider when making forum non conveniens determinations. At best, citizenship serves as an inadequate proxy for the American residence of plaintiff, which in turn is only one indicator of how inconvenient it may be for the plaintiff to litigate his case in a foreign forum . . . "); *cf. Reid-Walen*, 933 F. 2d at 1395 ("When an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country, many courts have partially discounted the plaintiff's United States citizenship.")

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[15] Responding to the Second Circuit's invitation, the Department of Justice, speaking on behalf of the State Department and the Office of the Solicitor General, addressed the significance of "national access" treaties in the *forum non conveniens* context by noting, among other things, that "'the Supreme Court has already made clear that the fact that the plaintiff is a citizen or resident of the United States is relevant but not dispositive in a forum non conveniens analysis'" and that "'any right to court access afforded to a foreign national plaintiff by treaty will generally be only a right to the same access that would be accorded to a U.S. national plaintiff who is otherwise similarly situated.'" *Iragorri*, 274 F.3d at 69 n.2 (*quoting* Letter from Att'y Michael J. Singer, Appellate Staff, Civil Div., U.S. Dep't of Justice, to Roseann B. MacKechnie, Clerk of Court (May 15, 2001)).

CONCLUSION

The Petition should be denied.

Respectfully submitted.

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No. 08-439

In The

Supreme Court Of The United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

As demonstrated below, Respondents' effort to portray the *forum non conveniens* doctrine as sufficiently *ad hoc*, flexible, and discretionary to avoid the need even to understand the domestic forum that is to be compared to the foreign forum fails both practically and logically and does not mute the conflict between the circuits on how the domestic forum should be defined. This Court should resolve the conflict and correct the Third Circuit's error of treating the absence of local contacts as decisive on the forum question.

I. THE "FLEXIBILITY" OF THE *FORUM NON CONVENIENS* DOCTRINE DOES NOT ELIMINATE THE NEED TO SPECIFY THE RELEVANT DOMESTIC FORUM.

The question presented by the Petition is whether, in addressing *forum non conveniens*, the relevant domestic forum – to be compared with the foreign forum – is the United States as a whole, or merely the judicial district in which the district court sits. The answer, as demonstrated in the Petition, is that the relevant domestic forum is, as a matter of principle, necessarily the United States as a whole. Focusing instead on the particular district where the court sits fundamentally changes the frame of reference and the result, as demonstrated by the decision below. The Third Circuit's decision to do so – and its suggestion that it was deciding only whether the case was convenient in New Jersey, implying that the Trustees were free to try their luck in another district – puts it in conflict with at least

three other circuits. Furthermore, the apparent confusion surrounding this issue (reflected in Respondents' arguments) and its importance (as reflected by the amicus filings) highlight why this is an issue that this Court should address.

A. The Forum Frame Of Reference Is Central To Both Steps Of The *Forum Non Conveniens* Inquiry, And Not Negated By The Need For Flexibility.

Respondents suggest that the split in the circuits on the question presented by the Petition is not as sharp as the Trustees have presented it. Respondents do not directly dispute that the Third Circuit adopted Respondents' argument that "the proper analysis focuses on ties to the forum district," not the nation. Respondents also offer no logical defense of why federal courts judging *forum non conveniens* should decide anything other than whether the entire United States presents a convenient forum.

Instead, Respondents assert that there is uniformity in the circuits because all courts acknowledge "flexibility" in the *forum non conveniens* balancing test that encompasses consideration of both national *and local* "factors," Br. in Op. at 6, "connections," *id.* at 8, or "interests," *id.* at 9. But the flexibility to consider "local interests" in the balance does not negate the need of the court to frame the convenience analysis with regard to the United States as a whole.

Respondents' mistake in invoking "flexibility" as a way of avoiding the need to specify the domestic forum is easily illustrated. The mistake is evident in each of the two steps of the established *forum non conveniens* analysis.

1. The Third Circuit Showed No "Flexibility" To Consider National Contacts In Refusing To Grant Deference To The Trustees' Choice Of Forum.

As this Court suggested in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), the first step of the *forum non conveniens* analysis is to determine how much deference to accord the plaintiff's choice of forum. With the degree of deference then determined, the court, at a second step, weighs the conveniences of the plaintiff's chosen forum against conveniences of the defendant's proposed forum.[1] Success at the second step often turns on whether deference is given to the plaintiff's choice of forum at the first step.

For plaintiffs who are U.S. citizens, courts readily defer to the choice of forum; the plaintiff has a presumed right to choose the forum. At this first step of the *forum non conveniens* analysis, however, *foreign* plaintiffs must, in effect, earn the court's

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[1] *See, e.g., Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45-46 (3d Cir. 1989) (first addressing deference to plaintiff's forum choice, then weighing private and public interest factors).

deference.[2] To obtain deference, the foreign plaintiff must make a *prima facie* showing of convenience for proceeding in the chosen forum. *See, e.g., Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989).

It is easily seen how the Third Circuit went astray at the first step by establishing a purely local frame of reference for its deference analysis. In denying deference to the Trustees' choice of forum based on the Trustees' ostensible failure to make a prima facie showing of convenience with respect to *New Jersey*, the Third Circuit did not give any serious consideration to the many conveniences raised by the Trustees for proceeding in the United States generally. *See* App. 12a-17a. The "flexibility" that Respondents tout was surely not demonstrated, and the court's focus on New Jersey in its forum frame of reference was thus decisive because the Trustees had otherwise made a prima facie showing of why *the United States* was a convenient forum for their lawsuit. The Third Circuit's focus on New Jersey left the Trustees with minimal deference to their forum choice.

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[2] Petitioners agree with *amicus curiae* INSOL Europe (at 10-13) that the statement in *Piper* that foreign plaintiffs are to be given "less deference" to begin than domestic plaintiffs (454 U.S. at 256) rests on antiquated factual foundations and should be reconsidered.

2. Examining Local Interests As Part Of The Balance Does Not Change The Forum Frame Of Reference.

Respondents' (and the Third Circuit's) error is easily seen at step two, also. "Flexibility" to consider both national *and local* "factors," Br. in Op. at 6, or "connections," *id.* at 8, or "interests," *id.* at 9, is traditionally cited as part of this second step, which balances conveniences between the plaintiff's chosen forum and the defendant's proposed foreign forum. But even at this second step, the "flexibility" associated with the application of the doctrine does not change the court's need to comprehend whether it should compare the foreign forum in relation to the entire United States or only the local district. As demonstrated in the Petition, courts should balance the conveniences of the *entire* United States against the foreign nation.

So what then of the frequently recited rule that the balance is sufficiently flexible that local interests can be considered as part of the balance? Simply put, consideration of local interest should not, in any way, change the forum frame of reference. Courts can surely consider whether affirmative local ties, along with affirmative national ties, weigh in favor of keeping the case in the United States. Thus, the *presence* of local ties is relevant. But a court cannot use the *absence* of local ties as a ground for moving the case from the United States. That approach inappropriately subordinates the interests of the United States to those of a particular locale.

That is precisely what the Third Circuit did, however. The Court of Appeals held, both in denying deference (step one) and in the balance (step two), that *the absence* of ties to New Jersey warranted dismissal. The court cited no rationale for that decision (and neither do Respondents). While local ties might support suit in the United States, the *absence* of local ties could be decisive only if the local district provided the proper frame of reference for comparison, which it does not, even at the second step of the *forum non conveniens* analysis.

In sum, Respondents' effort to reformulate the question presented to focus on the "flexibility" of the *forum non conveniens* doctrine to accommodate local considerations, Br. in Opp. at i, simply distorts the issue presented by the Petition and the Third Circuit's decision. The extent of the doctrine's "flexibility" is only relevant after the forum frame of reference is understood.

B. The Third Circuit Gave No Consideration To The Conveniences Of Proceeding In The United States.

In denying deference to the Trustees' choice of forum, the Third Circuit ignored the Trustees' showing of why they filed suit in the United States. As noted in the Petition (at 20-21), there were numerous and obvious reasons of convenience for filing here. Given its narrow focus on New Jersey, however, the Third Circuit found the fact that two defendants were New Jersey residents was insufficient to carry the day.

Respondents imply by their brief that the "flexible" analysis is so *ad hoc* that the court need not even determine whether it is analyzing the forum question in relation to the United States as a whole or the local district. Respondents fail, however, to identify any principled basis for *why*, in international litigation, the comparison should ever be between the local domestic forum and the national foreign forum. A federal court should, at least, be able to resolve the basic question of whether a case belongs in the United States, not merely in the district where the court sits.

Respondents also assert that the Third Circuit actually considered all relevant "factors," local and national, as part of the *second* step of its flexible analysis. Br. in Opp. at 8-9, 18-19. But even if one were to accept the proposition that an *ad hoc*, mixed-forum analysis is proper (which it is not), Respondents expressly argued to the Third Circuit that the *forum non conveniens* analysis never focuses on the United States as a whole but, rather, "focuses on ties to the forum district." This was precisely the logic embraced by the Third Circuit, which did not so much as pay lip service at step one of its analysis to the factors cited by Petitioners demonstrating national convenience. *See* App. 12a-17a.

Indeed, it is difficult to portray the Third Circuit's decision as even a partial comparison between the United States as a whole and the Dutch forum. The Third Circuit emphasized that "*New Jersey*" is not the home of the corporate defendant, that it did not believe evidence was "concentrated in

New Jersey," and that it did not believe the conduct giving rise to the lawsuit "occurred in *New Jersey*." *Id.* 15a (emphasis added). In a rare instance in which it expressly acknowledged any aspect of the Trustees' demonstration of convenience, *i.e.*, the presence of many witnesses in the United States (considered at step two), the court was utterly dismissive, stating that "almost all of the witnesses reside outside of *New Jersey*." *Id.* 23a (emphasis added). The court thus focused squarely on the local forum, exactly as Respondents urged. It stated that local inconvenience could dwarf national convenience, *see id.* 16a, and, without any explanation, concluded that this was such a case.

That the Third Circuit's analysis revolved around a comparison of *New Jersey* to the Dutch forum is demonstrated further by the court's express "caveat" that its ruling was not to be construed as reflecting its opinion of the convenience of the United States as a whole. *See id.* 16a. The court stated that its decision was "based on local considerations," and it left open the possibility that the Trustees could re-file their lawsuit "in another, *convenient* district." *Id.* (emphasis added).

Respondents argue that the Third Circuit was saying only that the preclusive effect of its decision was not being decided. *See* Br. in Opp. at 9 n.5. But the Third Circuit was not mincing words. As a corollary to its focus on New Jersey, it was acknowledging that it was only deciding the *forum non conveniens* question as it related to the *New Jersey* forum.

II. THE CIRCUITS ARE SPLIT ON WHAT CONSTITUTES THE RELEVANT FORUM IN FEDERAL LITIGATION.

The First, Eighth, and Eleventh Circuits all hold that the relevant American forum is the United States. Respondents' attempt to explain away the cases from these three circuits – all of which are good law and in direct conflict with the decision of the Third Circuit – falls far short.

The Eleventh Circuit held squarely in *Esfeld v. Costa Crociere, S.P.A.* that "federal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole." 289 F.3d 1300, 1303 (11th Cir. 2002). It does not matter that the case was decided in a diversity context. The impetus for the court's statement was a need to explain why the rule was different in federal court than it would be in state court. Indeed, it explained at length that in federal court, considerations of convenience to the locality are addressed under 28 U.S.C. § 1404(a). *See id.* at 1313.

The same rule was applied by the Eighth Circuit in *Reid-Walen v. Hansen*, which Respondents try to distinguish by pointing out that the plaintiff was a U.S. citizen suing out of her home federal district. But Respondents' point is a classic distinction without a difference: If the relevant forum in federal litigation is, as the Eighth Circuit plainly held, "any federal district in the United States, not the particular district where the plaintiff

lives," 933 F.2d 1390, 1394 (8th Cir. 1991), that is true regardless of the plaintiff's residence or citizenship.

As observed in the Petition, the First Circuit – emphasizing that "the choice ... was between two *countries*," and thus "local to the United States" – faulted the district court for limiting its perspective on forum "convenience" to the district in which the plaintiff had filed its suit. *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 429-30 (1st Cir. 1991) (emphasis in original). There is nothing "inexplicable" about why Petitioners did not cite the later opinion in *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992). The second *Mercier* opinion simply recognized that it is possible that the local connection to the lawsuit "*may*," as a "*subsidiary consideration*," factor into the balancing of interests between the domestic and foreign forums. *Id.* at 1355 (emphasis added). Even then it affirmed that the "transnational comparison" is "dominant." *Id.*

To the extent there is inconsistency and confusion in the lower courts on how local considerations come into play (as is suggested in the way that Respondents portray the *flexibility* of the doctrine), that is all the more reason for this Court to grant certiorari.

III. THE QUESTION RAISED BY THE PETITION IS WELL SUITED FOR REVIEW.

Respondents weakly suggest infirmities in the way this case developed in the district court that

might affect the disposition of the Petition. Respondents are wrong. The question presented by the Petition is one of law and arises directly from the decision of the Third Circuit as written. Nonetheless, for the sake of clarity, we address Respondents' suggestions briefly.

First, Respondents oddly and wrongly assert that the Trustees never argued that the United States was convenient. *See* Br. in Opp. at 17 n.8. As described in the Petition (at 20-21), the Trustees pointed out a range of convenience factors to the district court (and the Court of Appeals) demonstrating that the United States is a convenient, indeed logical, forum. Although wrong in its analysis, the Third Circuit (and the district court) never suggested that the Trustees failed to argue convenience, and the issue is fit for further review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (review is proper if an issue has been passed upon).

Second, regarding the "related Dutch proceedings" considered in the balance of interests, Br. in Opp. at 4, none of those matters was pending when this case was filed, one is simply an attempt by the same defendants to collect under a director and officers insurance policy for the defense of this and other related litigation, the second is a nominal investigatory proceeding by complaining shareholders, and the last is a suit by a bank stemming from a single loan made to KPNQwest. On the other hand, there were also several cases pending against the same defendants in the United

States, including cases involving conduct at KPNQwest, but the lower courts gave them no weight. *See* App. 31a.

Third, the district court's finding, with which the Third Circuit agreed, that the balance "tipped decidedly" in favor of trying this lawsuit in the Netherlands, *see* Br. in Opp. at 20-22, is no obstacle to review of the legal issue presented inasmuch as that finding itself was skewed by the lower courts' unusual focus on New Jersey, instead of the United States, as the relevant forum. Reliance on the district court's approach is particularly misplaced because the district court based its entire analysis on an explicit presumption of hostility toward foreign plaintiffs, *see* App. 50a & n.10, and the fact that the Trustees – appointees of a Dutch bankruptcy court – lacked connection to New Jersey in their personal capacity. *See id.* 57a. Although it was perhaps not as overtly suspicious of foreign plaintiffs as was the district court, the Third Circuit's focus on New Jersey reflected an equally improper and provincial approach to *forum non conveniens*.

Fourth, Chapter 15 of the Bankruptcy Code and the Treaty of Friendship both show that a foreign plaintiff's access to federal courts presents a national, not local, question. The Trustees did not invoke the treaty in their district court briefing but the district court *sua sponte* raised the supposed *absence* of such a treaty (which had already been presented to the district court) to justify denying deference to the Trustees. *See* App. 54a n.13; *id.* 57a n.14. The district court itself thus put the treaty of

friendship into issue, *see United States v. Williams*, *supra*, and the Trustees raised it again on appeal as a clear public interest factor and as supporting their claim that they were entitled to be treated on a par with U.S. citizens. The Third Circuit was wrong to ignore it.[3]

CONCLUSION

The petition should be granted.

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[3] Finally, the merits of the underlying RICO claim were not addressed below and are not at issue in this Court. *See id.* at 18 n.9.

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In the Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
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QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INSOL EUROPE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Dutch bankruptcy trustees may bring a lawsuit against U.S. defendants in a U.S. forum where a treaty between the United States and the Netherlands and the U.S. Bankruptcy Code authorize such lawsuits.

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BRIEF OF INSOL EUROPE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

INSOL Europe is a professional association with over 1,000 members. Founded in 1981 and based in Paris, it is devoted to issues of insolvency, bankruptcy, and business reconstruction and recovery. INSOL Europe facilitates the exchange of information and ideas, promotes best practice guidelines, publishes a newsletter, maintains a website, holds discussions with official European and International bodies responsible for the insolvency and restructuring process, and encourages greater co-operation and communication among insolvency professionals, the credit community, and related constituencies. INSOL Europe is a member association of INSOL International, a world-wide federation based in London.

INSOL Europe has a substantial interest in this Court's review of the ruling below, which dismissed a lawsuit brought by Dutch bankruptcy trustees as "inconvenient." Bankruptcy and insolvency practice is becoming increasingly global in scope. Bankruptcy courts and their appointed representatives must be able to pursue claims and assets across borders if they are to perform their vital functions properly. The dismissal of this lawsuit on *forum non conveniens* grounds—notwithstanding that it was filed

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and discloses that petitioners made a monetary contribution to its preparation and submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

against U.S. defendants with the approval of the Dutch bankruptcy court—can only undermine the required cross-border cooperation. INSOL Europe is particularly concerned because the rulings below appear inconsistent with provisions in the U.S. Bankruptcy Code that authorize lawsuits in U.S. courts by foreign bankruptcy trustees, as well as with provisions in the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands that guarantee equal access to U.S. courts by Dutch nationals. We believe that the experience of our membership will assist the Court in determining whether to review the decision below.

SUMMARY OF ARGUMENT

The threshold dismissal of the Dutch Trustees' lawsuit as "inconvenient" appears to conflict with the authorization for such suits in both the U.S. Bankruptcy Code and a commercial treaty between the United States and the Netherlands. It also appears to misapply the *forum non conveniens* doctrine.

Chapter 15 of the Bankruptcy Code, 11 U.S.C. § 1501 *et seq.*, authorizes foreign representatives (including bankruptcy trustees) to bring claims in U.S. courts if they are in connection with a foreign proceeding. The courts below failed to take account of that authorization in evaluating the merits of respondents' *forum non conveniens* motion.

The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States, Mar. 27, 1956, 8 U.S.T. 2043 ("FCN Treaty"), mandates "national treatment" with respect to court access by nationals of the other treaty party. The courts below disregarded that

mandate in adjudicating respondents' *forum non conveniens* motion.

INSOL Europe respectfully requests that this Court review the rulings below in light of these Bankruptcy Code and FCN Treaty provisions. INSOL Europe further suggests that this Court revisit its statement in *Piper Aircraft* that foreign plaintiffs are entitled to less deference in their choice of a U.S. forum, at least where (as here) the defendants reside in the United States.

ARGUMENT

As petitioners contend, the focus of the courts below on the District of New Jersey, rather than on the United States as a whole, for *forum non conveniens* purposes warrants this Court's review. The Court also should review the failure of the courts below to give effect to two expressions of United States policy—Chapter 15 of the U.S. Bankruptcy Code and the FCN Treaty between the Netherlands and the United States. INSOL Europe respectfully requests that the Court grant the petition to ensure that U.S. courts apply these provisions and accord foreign plaintiffs bringing suit against U.S. defendants the same level of deference that U.S. plaintiffs receive with respect to choice of forum.

I. Chapter 15 Of The Bankruptcy Code Mandates Equal Access To U.S. Courts For Foreign Bankruptcy Trustees.

In 2005, Congress added a new chapter to the Bankruptcy Code. The new Chapter 15 was based on the Model Law on Cross-Border Insolvencies drafted by the United Nations Commission on International Trade Law ("UNCITRAL"). See 11 U.S.C. § 1501; Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am.

Bankr. L.J. 713, 719 (2005) ("Chapter 15 was drafted to follow the Model Law as closely as possible").

The purpose of the new law was to foster cross-border cooperation in insolvency-related proceedings:

> The purpose of this chapter is to * * * provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment; * * *.

11 U.S.C. § 1501(a). Chapter 15 applies where "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding." *Id.* § 1501(b). A foreign representative may seek recognition of a foreign proceeding or "sue in a court in the United States to collect or recover a claim which is the property of the debtor." *Id.* §§ 1509(a), (f). U.S. courts are directed to "cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee." *Id.* § 1525(a).

The impact of these provisions must be considered when determining whether Dutch bankruptcy trustees may proceed with a lawsuit in a U.S. court to recover funds for the bankruptcy estate from defendants residing in the United States. Yet, the

Third Circuit did not even *mention* Chapter 15. Although the district court did mention Chapter 15, it misread it to apply only to a "*debtor* that is subject to a bankruptcy case of some kind in the United States." Pet. App. 91a. As the above provisions make clear, Chapter 15 is not so constricted, authorizing lawsuits by "a foreign representative in connection with a foreign proceeding." 11 U.S.C. § 1501(b). Petitioners are foreign representatives (court-authorized bankruptcy trustees) who, in connection with a foreign proceeding, seek to recover funds allegedly misappropriated from the debtor. Pet. App. 4a. In addressing respondents' *forum non conveniens* motion, the district court should not have given Chapter 15 such short shrift.

The claim at issue, involving allegations that U.S. defendants directed a scheme from the United States to impose harm on a Dutch entity, appears particularly well-suited to adjudication in the United States. Just as a trustee in a domestic bankruptcy is authorized to bring actions to "collect and reduce to money the property of the estate for which such trustee serves" (11 U.S.C. § 704(a)), a foreign trustee often can perform those essential tasks only if it may file proceedings in the United States.

Global commerce produces global insolvencies and bankruptcies. Today, "[a]s the ripples of the credit crunch's effect are felt across the globe, the chances of insolvencies happening across borders and jurisdictions are more likely than ever." Editor's Note to Adam Gallagher, *European Insolvency Regulation: German Court Blesses Change of COMI to Bolster Cross-Border Group Restructuring*, 27 Am. Bankr. Inst. J. 30, 30 (2008). These sprawling bankruptcies give rise to massive proceedings that cannot

be confined to the courts of a single nation. "Economic globalization and integration over the last decade has vastly increased the number of companies that operate, own assets, or otherwise conduct business in multiple countries." Aaron L. Hammer & Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know about Cross-Border Insolvency Legislation in the United States*, 14 L. & Bus. Rev. Am. 257, 258 (2008). Bankruptcy proceedings must follow those assets and businesses across national borders. Indeed, "it is increasingly unusual to find a major case without at least some international aspects." *Ibid.*

The Model Law that Congress incorporated into the Bankruptcy Code as Chapter 15 sought to heal an intolerable disconnect between the global nature of such bankruptcies and the local nature of insolvency and bankruptcy law. Its purpose was to overcome "inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder maximization of the value of those assets." *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* ¶ 13, Annex 1 of the Report of the 30th Session of UNCITRAL, U.N. Doc. A/CN.9/442 (1997). To achieve that purpose, Chapter 15 ensures that foreign parties have access to U.S. courts on par with that of domestic parties, thereby providing "greater legal certainty for trade and investment." H. Rep. No. 109-31, at 105 (2005).

Cross-border litigation in relation to global bankruptcies is now widely authorized throughout the world. Indeed, fifteen nations have incorporated a version of the Model Law into their own bankruptcy codes. See *Australia Adopts Legislation Based on UNCITRAL Model Law on Cross-Border Insolvency*, UN Information Service, May 21, 2008.[2] As one of those nations, the United States has an obligation to adjudicate authorized claims brought in connection with foreign bankruptcy proceedings. Instead, the courts below established unduly steep barriers to the initiation of such litigation by foreign parties, contrary to the will of Congress.

In enacting Chapter 15, Congress made "comity" the "central concept." H. Rep. No. 109-31, *supra*, at 109; see 11 U.S.C. § 1508 ("In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions"). The district court's dismissal of petitioners' suit as inconvenient, and the affirmance of that ruling by the Third Circuit, will inevitably be viewed as a rejection of comity, which is grounded (at least in part) in reciprocity. See Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS § 35 (M. Bigelow ed. 1883) (comity requires that our courts render justice to foreign parties "in order that justice may be done to us in return"); *Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895). If courts shut the courthouse door to lawsuits filed by foreign parties in connection with foreign proceedings, retaliation against U.S. parties abroad is likely,

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[2] Available at http://www.unis.unvienna.org/unis/pressrels/2008/unisl118.html.

a harm Congress sought to avoid. This Court should grant the petition to ensure that U.S. courts understand the purpose of Chapter 15 and do not misapply the *forum non conveniens* doctrine to effectively bar such lawsuits by foreign bankruptcy trustees.

II. The Dutch-U.S. FCN Treaty Mandates National Treatment When Foreign Plaintiffs Sue In U.S. Courts.

In 1957, the Netherlands and the United States entered into a bilateral treaty that, *inter alia*, provides that nationals of each party "shall be accorded *national treatment* with respect to access to the courts of justice * * * in all degrees of jurisdiction, both in pursuit and in defense of their rights." FCN Treaty, art. V.1 (emphasis added). The treaty defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals [of] such Party." *Id.* art. 23.1. Treaty interpretation must "begin with the language of the Treaty itself." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). That language mandates that U.S. courts are to treat Dutch plaintiffs as if they were U.S. nationals.

The courts below failed to heed that mandate. The district court denied that there is an FCN treaty between the Netherlands and the United States (Pet. App. 57a n.14), and the Third Circuit did not even mention the treaty. Moreover, they accorded the Dutch Trustees' choice of a U.S. forum little or no deference, in contrast to the substantial deference accorded to the choice of forum by a domestic plaintiff. See Pet. App. 13a-15a. Such differential treatment cannot be reconciled with the "national treatment" mandate of the treaty.

An FCN treaty is "one of the most familiar instruments known to diplomatic tradition." Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 805 (1958). Since the first such treaty in 1778 with France, FCN treaties have "figured repeatedly in the conduct of American foreign relations." *Ibid.*; see Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, 204 (1988). The FCN Treaty with the Netherlands is one of twenty-one similar treaties entered into by the United States after World War II. National treatment provisions were included in the post-World War II treaties to prevent obstacles to court access through domestication, registration, or other discriminatory requirements. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 235 (1956). National treatment "is ordinarily the highest level of protection afforded by commercial treaties." *Sumitomo Shoji*, 457 U.S. at 188.

Courts must "respect treaty stipulations when they become the subject of judicial proceedings" because "the honor of the government and people of the United States is involved." *Chew Heong* v. *United States*, 112 U.S. 536, 540 (1884). Failure to enforce the FCN's national treatment provision would undermine the interests of the United States. As the Seventh Circuit has noted, "the rights granted by the [U.S.-Japan FCN Treaty] are reciprocal." *Fortino* v. *Quasar Co.*, 950 F.2d 389, 393-394 (7th Cir. 1991). Thus, any discrimination against foreign parties in U.S. courts is likely to result in reciprocal discrimination against U.S. parties abroad. The very purpose of national treatment provisions is to replace such

retaliation (and its inevitable escalation) with cooperation and mutually enforceable rights.

The Third Circuit's failure to account for the FCN Treaty deviates from these established principles and conflicts with the approach of other courts of appeals. The Second Circuit, for example, accords "the same deference as that afforded the choice of a U.S. citizen" to a foreign plaintiff's forum choice, if the plaintiff's country has an FCN treaty with the U.S. that includes a national treatment provision. *Pollux Holding Ltd.* v. *Chase Manhattan Bank*, 329 F.3d 64, 72-73 (2d Cir. 2003); *Irish Nat'l Ins. Co.* v. *AER Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984); *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). And whereas the Ninth Circuit holds "less deference is not the same thing as no deference" (*Lueck* v. *Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001)), the Third Circuit accorded virtually no deference to the Trustees' choice of a U.S. forum. See Pet. App. 12a.

Such conflicting applications of similar treaty provisions prevent the United States from speaking with a uniform voice and can only undermine the confidence that other countries require before entering into treaties with the United States. This Court should resolve this conflict to ensure that the treaty rights of foreign plaintiffs are given effect in accord with established U.S. policy.

III. The Court Should Revisit Its *Piper Aircraft* Statement That A Foreign Plaintiff's Choice Of Forum Is Entitled To Less Deference.

The courts below relied in part on a statement in *Piper Aircraft* v. *Reyno*, 454 U.S. 235, 256 (1981), that a foreign plaintiff's choice of forum warrants

"less deference" than a domestic plaintiff's. That statement, representing the plurality view of four Justices, should be revisited.[3] See Eugene Gressman et al., SUPREME COURT PRACTICE 252-253 (9th ed. 2007) (certiorari is often granted because a prior Court precedent is "ripe for reexamination").

First, the Court provided no guidance as to what "less deference" means and, in particular, whether deference is reduced when the defendants reside in the U.S. Lacking such guidance, some courts have accorded virtually *no* deference to the forum choice of foreign plaintiffs, an approach at odds with this Court's doctrine that, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).

The decision below is a good example of such an over-extension of *Piper Aircraft*. The Third Circuit ruled that a foreign plaintiff must make a "strong showing" by presenting "considerable evidence" to "overcome" a presumption that its forum choice was inconvenient. Pet. App. 12a-13a. That heavy burden creates a virtually insuperable barrier to suits by foreign plaintiffs in the United States. Whatever merit such a barrier may have when the defendant too is foreign, it has none when the defendant resides in the United States. The ruling below—that a claim under U.S. law brought by Dutch plaintiffs against a U.S. entity and its principals who reside in the U.S.

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[3] Justices Powell and O'Connor did not participate in the decision, and Justices White, Brennan, and Stevens dissented from that portion of the opinion. See *Piper Aircraft*, 454 U.S. at 261 (White, J., concurring in part and dissenting in part); *id.* at 261-262 (Stevens, J., dissenting).

is inconvenient for the defendants—appears to make little sense. A suit filed in the home forum of the defendant should be presumed convenient to both parties—to the plaintiff because it chose the forum, and to the defendant because that forum is its home. The adverse implications of the contrary ruling below warrant this Court's review.

Second, the *Piper Aircraft* statement has been subject to considerable criticism. Leading civil procedure commentators warn of "a significant risk of depriving, in the name of 'convenience,' a plaintiff of an American forum when the parties or controversy have a legitimate connection to the United States." Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 3828, at 625 (3d ed. 2007). See also *Myers* v. *Boeing Co.*, 794 P.2d 1272, 1280-1281 (Wash. 1990) (en banc) (criticizing the *Piper Aircraft* "less deference" statement for lacking "supportive analysis or reasoning," raising "concerns about xenophobia," and being unnecessary in light of the "fair and equitable results" produced by standard *forum non conveniens* balancing); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 Hous. J. Int'l L. 385, 395-396 (2004) (rejecting lesser deference for foreign plaintiffs given realities of global commerce and litigation); John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 Ohio St. L.J. 659, 691 (2004).

Finally, the basis for much of that criticism—the importance of dismantling barriers to cross-border litigation in today's global economy—is one that this Court has often endorsed. The Court has warned that a "parochial" attitude towards foreign parties

could "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 516-517 (1974). Accordingly, courts must heed the "concerns of international comity" and show "sensitivity to the need of the international commercial system." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

By failing to defer to the choice of a U.S. forum by Dutch plaintiffs on claims against U.S. defendants, the courts below departed from these fundamental principles. This Court should review those rulings and provide guidance to the lower courts on this important and recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

MARCEL WINDT and E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; JOSEPH P. NACCHIO; and ROBERT S. WOODRUFF,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE KINGDOM OF THE NETHERLANDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

In 1956, the Kingdom of the Netherlands entered into a Treaty of Friendship, Commerce and Navigation with the United States ("Treaty"), 8 U.S.T. 2043, in order to "strengthen[] the bonds of peace and friendship traditionally existing between them" and "encourag[e] closer economic and cultural relations." Among other things, the Treaty establishes "arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges." Treaty pmbl.

An enormous amount of trade is conducted under the auspices of the Treaty. The Netherlands is the fourth-largest direct foreign investor in the United States, with direct investments of $189 billion as of 2006. The United States is the third-largest direct foreign investor in the Netherlands, with direct investments of $216 billion as of 2006. *See* U.S. Dep't of State, *Background Note: The Netherlands* (Oct. 2008), at http://www.state.gov/r/pa/ei/bgn/3204.htm. The Netherlands is also the eighth-largest destination for U.S. exports, and more than 1,600 U.S. companies maintain subsidiaries or offices in the Netherlands. *Id.*

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[1] This brief is filed with the accompanying written consent of all parties. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

In light of these historic and extensive trading and investment ties, the Netherlands has a significant interest in ensuring that its nationals have appropriate and nondiscriminatory access to U.S. courts for the peaceful and impartial resolution of the commercial disputes that inevitably arise from extensive bilateral commerce. The Netherlands also has an overriding interest in ensuring that its Treaty with the United States is properly construed and honored.

SUMMARY OF ARGUMENT

As commerce becomes ever more global and cross-border transactions ever more prevalent, commercial parties increasingly depend on courts of justice to provide clear, fair, and efficient processes for resolving their disputes with parties from other countries. That is why the Treaty provides that nationals of the Netherlands and the United States are to receive "national treatment with respect to access to the courts" of the other nation.

In upholding dismissal of petitioners' lawsuit on *forum non conveniens* grounds, the opinions below suggest that the courts would have reached a different result if the plaintiffs had been U.S. nationals, whose choice of forum would have been afforded a high degree of deference even if all other facts and circumstances were the same. That differential treatment appears to conflict with the rights of Dutch nationals and the obligations of the United States under the Treaty, warranting this Court's review.

ARGUMENT

The Lower Courts' Apparent Disregard of The Treaty Rights of Dutch Nationals Warrants This Court's Review.

The Treaty requires "national treatment with respect to access to the courts" of each country. Yet, the court of appeals' opinion does not even mention the Treaty, and the district court asserted that there is no such treaty: "This Court is aware of no bilateral or multilateral Treaty of Peace, Friendship, Navigation and Commerce * * * granting the Netherlands nationals 'national treatment' for the purposes of access to this nation's courts." Pet. App. 57a n.14. The Netherlands respectfully suggests that this Court's review is required to ensure that U.S. courts recognize the Treaty and give effect to its "national treatment" mandate.

Article V, Section 1 of the Treaty states in relevant part:

> Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

Accordingly, nationals of the Netherlands, including petitioners here, are entitled to "national treatment" --*i.e.*, to be treated as nationals of the United States —with respect to court access in the United States.

The court of appeals ruled that the district court correctly "accorded the foreign Trustees a low degree

of deference." App. 13a. It acknowledged that "[o]rdinarily, a strong presumption of convenience exists in favor of a domestic plaintiffs' chosen forum, and this presumption may be overcome only when the balance of the public and private interests clearly favors an alternate forum." *Id.* at 12a. However, it held that "'a foreign plaintiff's choice deserves less deference.'" *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)). That conclusion appears inconsistent with the Treaty.

If a U.S. plaintiff filing suit against a U.S. defendant has a choice of international fora, and chooses to file suit in the U.S., that plaintiff would be entitled to a strong presumption in favor of his or her choice. Under the Treaty's national treatment mandate, a Dutch plaintiff should be entitled to the same presumption in those circumstances. Where the issue is the convenience of the U.S. as a forum, applying a different presumption to U.S. and foreign plaintiffs would not appear to be "national treatment." Indeed, under the approach of the courts below, a Dutch national would receive the same disfavored treatment as the national of a non-signatory country, thereby effectively voiding the Treaty's national treatment provision.

In this case, petitioners' right to bring suit should be even less subject to doubt than that of other Dutch nationals. Being court-appointed and subject to court supervision, the Trustees are effectively instruments of the Dutch judicial system. As such, their judgment regarding the relative convenience between United States and Dutch forums would be particularly well informed and entitled to deference

In sum, the Netherlands believes that the petition raises an important and recurring issue and requests that the Court clarify that treaty guarantees of national treatment with respect to court access should play a meaningful role in *forum non conveniens* analysis.

CONCLUSION

The Court should grant the petition to clarify the role of treaty provisions in the *forum non conveniens* framework.

Respectfully submitted,

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